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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

	)	IBLA Appeal No. _____
	)	
HIGH COUNTRY CITIZENS' ALLIANCE,	)	
WILDEARTH GUARDIANS,	)	**APPEAL OF THE RECORD OF DECISION**
SIERRA CLUB, and	)	**FOR FEDERAL COAL LEASE**
ROCKY MOUNTAIN WILD,	)	**MODIFICATIONS COC-1362 & COC-67232,**
	)	**DOI-BLM-CO-SO50-2012-0013,**
Appellants.	)	**GUNNISON COUNTY, COLORADO**
	)	
	)	
_____	)	

NOTICE OF APPEAL

AND

PETITION FOR STAY

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NOTICE OF APPEAL

Pursuant to 43 C.F.R. §§ 4.21, 4.410-4.413, High Country Citizens' Alliance, WildEarth Guardians, Sierra Club, and Rocky Mountain Wild (collectively, "Appellants") file this Notice of Appeal and Petition for Stay of a decision made by Bureau of Land Management ("BLM") Colorado State Office Director, Helen M. Hankins. On December 27, 2012, State Director Hankins signed a Record of Decision that "will allow the BLM, with the consent of the USFS [U.S. Forest Service] to lease the federal mineral estate underlying the National Forest System (NFS) lands included in Federal coal lease modifications COC-1362 and COC-67232."[1]

This appeal is timely filed. 43 C.F.R. § 4.411.[2]

PETITION FOR STAY

I. BACKGROUND

A. The West Elk Mine and Coal Lease Modifications COC-1362 & COC-67232

On December 27, 2012, BLM's Colorado State Director Helen Hankins issued a Record of Decision (ROD) approving coal lease modifications for lease numbers COC-1362 & COC-67232 for (Lease Modifications) approximately 1,700 acres of federal coal adjacent to the West Elk Mine's existing leases near Somerset, Colorado.[3] The West Elk Mine is one of the largest underground mines in Colorado, and the Lease Modifications will allow the mine's owners and operators – Arch Coal and Mountain Coal Company (MCC) – with access to approximately 10.1 million tons of federally-owned coal within the two lease modifications area, and will result in the daily venting of millions of cubic feet

[1] BLM, Record of Decision for the Final Environmental Impact Statement, Federal Coal Lease Modifications COC-1362 & COC-67232 (Dec. 27, 2012) ("BLM ROD"), attached as Exh. 1. Exhibits are provided to the Board in hard copy and as Adobe PDF files on discs accompanying this filing. The Board may find many of the color maps and photographs easier to view and zoom in on in the electronic format.

[2] Appellants received written notice of BLM's decision via the Federal Register on December 28, 2012. See 77 Fed. Reg. 76,516 (Dec. 28, 2012). See also BLM ROD (Exh. 1) at 12 (notice of appeal must be filed with IBLA within 30 days of Federal Register notice publication). This Notice of Appeal is filed within the 30-day period for appeal following receipt of notice. See 43 C.F.R. § 4.411(a)(2)(i).

[3] See BLM ROD (Exh. 1) at 1.

of methane, a potent greenhouse gas, directly into the atmosphere for over a year and a half; the mine vented an average of 7.5 million cubic feet of methane daily in early 2010.[4] The ROD will also allow MCC to mine an additional 8.9 million tons of coal on adjacent private lands and on the parent coal leases; without the Lease Modifications, this additional coal would not be mined.[5] To safely mine the coal within the Lease Modifications area, MCC must remove methane, an explosive gas, found in the coal seam. MCC's reasonably foreseeable mine plan ("RFMP") estimates that it will drill about 48 methane drainage wells (MDWs) from 48 drill pads, each disturbing an estimated acre of land.[6] Accessing the well pads will require the construction of an estimated 6.5 miles new road on the GMUG National Forest, all within lands identified by the Forest Service as "roadless," and on lands directly adjacent to the West Elk Wilderness.[7] This construction will destroy vegetation and wildlife habitat – including habitat for the Canada lynx, a species protected as "threatened" under the Endangered Species Act.[8] Similar impacts will occur on private and Forest Service lands outside the Lease Modifications area and only mined because of the approval of the Lease Modifications. Extending the life of the Mine for nearly three years will also cause significant amounts of air pollution from the exhaust of trucks, heavy equipment, rail transport, and from MDW emissions.

Appellants High Country Citizens' Alliance, WildEarth Guardians, Sierra Club and Rocky Mountain Wild file this appeal and petition for stay to set aside BLM's decision approving Lease

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[4] U.S. Forest Service, Final Environmental Impact Statement, Federal Coal Lease Modifications COC-1362 & COC-67232 (Aug. 2012) ("FEIS") at 30, 38; MCC 2010 First Quarter Methane Release Report, excerpts attached as Exh. 2. Because of its length, Appellants provide only cited excerpts of the 600+ page FEIS. The entire FEIS is available at http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/68608_FSPLT2_263949.pdf (Vol. I) and http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/68608_FSPLT2_263950.pdf (Vol. II) (both last viewed Jan. 28, 2013).

[5] FEIS (Exh. 2) at 54 ("leasing and development of the lease modifications also allow for the production of 5.6 million tons of fee coal on adjacent lands … as well as an additional 3.3 million tons from existing adjacent federal coal reserves").

[6] Id. at 53.

[7] Id. at 54 (6.5 miles), id. at 3, 36 (roadless lands).

[8] Id. at 129.

Modifications for COC-1362 and COC-67232. BLM violated the National Environmental Policy Act (NEPA) by failing to analyze and disclose the Lease Modifications' indirect and cumulative impacts, by ignoring the project's socioeconomic harms, and by failing to disclose the impacts of air pollution and methane drainage well and road construction caused by the Lease Modifications. BLM has also violated the Endangered Species Act by failing to consult on the full scope of direct and indirect impacts of the project on the threatened lynx. BLM also bases its decision on the illegally-adopted Colorado Roadless Rule. BLM's violations mean Appellants are likely to succeed on the merits. Appellants demonstrate that the air pollution, road and well-pad construction, and other impacts that may occur imminently as a result of the Lease Modifications will irreparably harm the environment, Appellants, and their members. In contrast, a brief stay while this Board deliberates will not harm BLM or any other party. Finally, the public interest favors environmental protection and legal compliance in this case. Appellants therefore meet all the requirements for a stay.

B. Procedural History

On January 16, 2009, the BLM received an application from Mountain Coal Company (MCC) to modify lease COC-1362 by adding approximately 800 acres; and an application from Ark Land Company (ALC) to modify lease COC-67232 by adding about 921 acres.[9] Because the Lease Modifications would add to existing leases mineral resources under lands administered by the U.S Forest Service, BLM could approve such lease modifications only by first obtaining the Forest Service's "consent."[10] On January 26, 2009, BLM requested that the Grand Mesa, Uncompahgre & Gunnison (GMUG) National Forest analyze the proposed lease modifications.[11]

Although the proposed lease modifications would lead to extensive road construction in an inventoried roadless area, the GMUG National Forest initially prepared a low-level environmental assessment (EA) pursuant to the National Environmental Policy Act (NEPA) and a decision notice

[9] BLM ROD (Exh.) at 1.

[10] 43 C.F.R. § 3432.3(d).

[11] FEIS (Exh. 2) at 2.

consenting to the lease modifications in November 2011. Conservation groups, including Appellants, filed an appeal with the Regional Forester pursuant to 36 C.F.R. § 215. In response, the Forest Service rescinded its decision notice in February 2012.[12]

The Forest Service then prepared a draft EIS, published in May 2012.[13] Although BLM was listed as a cooperating agency on the draft EIS, BLM published its own "preliminary" environmental assessment and draft finding of no significant impact (FONSI) on the lease modifications application.[14] The 60-page preliminary EA purported to "incorporate by reference" the Forest Service's Draft EIS, and many of the EA's 60 pages repeated verbatim parts of the Forest Service's analysis.[15] Appellants commented on both the Draft EIS and BLM's preliminary EA.[16] In August 2012, the Forest Service issued its Final EIS and a ROD consenting to the lease modifications.[17] BLM is listed as a cooperating agency on the Final EIS.[18]

Conservation groups, including Appellants, appealed the Forest Service's ROD to the Regional Forester's office in September 2012.[19] The Regional Forester's office denied the appeal in November 2012, and consented to the lease modifications in December 2012.[20]

BLM did not complete its own EA. Instead BLM State Director Helen Hankins signed a Record of Decision on December 27, 2012 that relies upon and "adopts" the Forest Service's Final EIS. BLM's

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[12] BLM ROD (Exh. 1) at 7.

[13] Id. at 8.

[14] Id. at 9.

[15] BLM, Environmental Assessment for the West Elk Coal Lease Modification Application, DOI-BLM-CO-150-2012-13-EA (June 2012) at 5 ("BLM EA"), attached as Exh. 3.

[16] See letter of E. Zukoski, Earthjustice on behalf of High Country Citizens' Alliance et al., to GMUG National Forest (July 9, 2012), attached as Exh. 4; letter of E. Zukoski, Earthjustice on behalf of High Country Citizens' Alliance, to BLM (July 9, 2012), attached as Exh. 5.

[17] See U.S. Forest Service, Record of Decision, Federal Coal Lease Modifications COC-1362 & COC-67232 (Aug. 2, 2012), excerpts attached as Exh. 6.

[18] BLM ROD (Exh. 1) at 1.

[19] See WildEarth Guardians et al., Appeal of the Forest Service Record of Decision for Federal Coal Lease Modifications COC-1362 & COC-67232 (August 2, 2012), attached as Exh. 7.

[20] BLM ROD (Exh. 1) at 2.

ROD selects Alternative 3 as described in the Final EIS and the Forest Service's ROD.[21] BLM published official notice of its ROD in the Federal Register on December 28, 2012.[22] The Federal Register notice and BLM's ROD state that appeals to the IBLA are considered timely if filed within 30 days of the Federal Register notice.[23]

Appellants now appeal to this Board the December 27, 2012 ROD and the Forest Service Final EIS upon which it relies.

II. APPELLANTS ARE ADVERSELY AFFECTED PARTIES TO THE CASE.

"A petition for a stay pending appeal may be filed only by a party who may properly maintain an appeal." 43 C.F.R. § 4.21(a)(2). To maintain an appeal, Appellants must: (1) be a party to the case, and (2) be adversely affected by the decision being appealed. Id. § 4.410(a); Nat'l Wildlife Fed'n v. BLM, 129 IBLA 124, 125 (1994). Appellants meet both tests.

First, Appellants are parties to the case.[24] An organization or individual is a "party to the case" if either has "participated in the process leading to the decision under appeal, e.g., by ... commenting on an

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[21] Id. at 1-3.

[22] 77 Fed. Reg. 76,516 (Dec. 28, 2012).

[23] Id.; BLM ROD (Exh. 1) at 12.

[24] High Country Citizens' Alliance (HCCA) is a not-for –profit conservation organization headquartered in Crested Butte, Colorado. HCCA's mission is to champion the protection, conservation and preservation of the natural ecosystems within the Upper Gunnison River Basin. Declaration of Matt Reed (Jan. 25, 2013) at ¶ 2 ("Reed Decl."), attached as Exh. 8.

WildEarth Guardians is a non-profit environmental organization dedicated to protecting and restoring the wildlife, wild places and wild rivers throughout the American West. WildEarth Guardians is headquartered in Santa Fe, New Mexico, but maintains offices in Denver and Phoenix. WildEarth Guardians has over 5,000 dues-paying members and more than 18,000 supporters. Through its Climate and Energy Program, WIldEarth Guardians aims to confront the effects of global climate change to protect the wildlife, wild places, and wild rivers of the American West. WildEarth Guardians works for clean energy solutions that can help our society shift away from the use of fossil fuels in order to safeguard our climate, our clean air, and our communities. See Declaration of Jeremy Nichols (Jan. 28, 2013) at ¶¶ 3-4 ("Nichols Decl."), attached as Exh. 9.

The Sierra Club is a national nonprofit organization of approximately 1.3 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Rocky Mountain Chapter of the Sierra Club has approximately

environmental document" concerning the proposed action. 43 C.F.R. § 4.410(b). Here, Appellants submitted written comments to BLM on its preliminary EA, and submitted subsequent supplemental comments, and submitted comments and appealed the Final EIS upon which the BLM relies to support its decision.[25] High Country Citizens' Alliance, WildEarth Guardians, Sierra Club, and Rocky Mountain Wild are thus "parties to the case."

Second, the Appellants will "be adversely affected" by Lease Modifications COC-1362 & COC67232. See 43 C.F.R. § 4.410(a). To demonstrate that one will be adversely affected, a party must show that it has a "legally cognizable interest" and that "the decision on appeal has caused or is substantially likely to cause injury to that interest." Id. § 4.410(d). This requisite "interest" can be established by cultural, recreational, or aesthetic uses, as well as enjoyment of the public lands. See, e.g., Colo. Envtl. Coal., 171 IBLA 256, 260-61 (2007) (hiking in area impacted sufficient to establish required "interest"); Wyo. Outdoor Council, 153 IBLA 379, 383 (2000) (legally cognizable interest in the land "need not be an economic or a property interest" and "[u]se of the land will suffice"); S. Utah Wilderness Alliance, 127 IBLA 325, 327 (1993); Animal Prot. Inst. of Am., 117 IBLA 208, 210 (1990). The IBLA does not require a showing that an injury has actually occurred. Rather, a colorable allegation of injury suffices. Powder River Basin Res. Council, 124 IBLA 83, 89 (1992). The IBLA has previously found that WildEarth Guardians's and Sierra Club's aesthetic and recreational interests in lands used by a group member that were the subject of a BLM coal lease in Colorado's North Fork Valley were "more than

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14,000 members in the State of Colorado. The Sierra Club's highest national priority campaign is its "Move Beyond Coal" Campaign, which aims to transition the nation away from coal and toward clean energy solutions. Id. at ¶ 5.

Rocky Mountain Wild is a non-profit environmental organization based in Denver and Durango, Colorado, that works to conserve and recover the native species and ecosystems of the Greater Southern Rockies using the best available science. Id. at ¶ 6.

[25] See, e.g., letter of E. Zukoski to BLM (Exh. 5); letter of E. Zukoski to Forest Service (Exh. 4); letter of E. Zukoski, Earthjustice to B. Sharrow, BLM (Oct. 24, 2012), attached as Exh. 10; letter of E. Zukoski, Earthjustice to B. Sharrow, BLM (Nov. 13, 2012), attached as Exh. 11; letter of E. Zukoski, Earthjustice to B. Sharrow, BLM (Nov. 21, 2012), attached as Exh. 12.

sufficient" to establish that the group was an adversely affected party to the case. Order, WildEarth Guardians & Sierra Club, IBLA 2011-191, 2012 WL 721790 (Feb. 6, 2012) at *3.

Moreover, it is not necessary for parties to show that they have actually set foot on the impacted parcel or parcels to establish use or enjoyment for purposes of demonstrating adverse effects. Rather, "one may also establish he or she is adversely affected by setting forth interests in resources or in other land or its resources affected by a decision and showing how the decision has caused or is substantially likely to cause injury to those interests." Coal. of Concerned Nat'l Park Retirees, 165 IBLA 79, 84 (2005).

Here, each of the Appellant groups demonstrates that they will be adversely affected by the Coal Lease Modifications ROD pursuant to this Board's standards. Jeremy Nichols testifies that he is a member and employee of WildEarth Guardians, and a member of Sierra Club and Rocky Mountain Wild. He states that he has personally used and enjoyed the Forest Service lands that are part of the Lease Modifications area – including the lands that will be damaged by the road and methane well construction that the Lease Modifications anticipate and make possible – for recreational, aesthetic, and conservation purposes, and that he intends to return to this area for enjoyment. Mr. Nichols testifies that he intends to return to the Lease Modifications area, and that the construction made reasonable foreseeable by this decision will harm his recreational, aesthetic, wildlife, and other interests.[26] Mr. Nichols's declaration establishes that BLM's decision to approve the Lease Modifications will adversely affect his legally cognizable interests in recreation, aesthetic enjoyment, and conservation in these areas through foreseeable road and well-pad construction, increased air pollution, and other environmental impacts that will result from mining that is reasonably foreseeable within the Lease Modifications area as a result of

[26] See Nichols Decl. (Exh. 9) at ¶¶ 8-24.

BLM's ROD. Thus, Mr. Nichols's declaration establishes that WildEarth Guardians, Sierra Club and Rocky Mountain Wild will be adversely affected by BLM's Lease Modifications ROD.[27]

Similarly, Matt Reed declares that he is a member and recent employee of High Country Citizens' Alliance (HCCA). He states that he has repeatedly enjoyed the scenic beauty of the Lease Modifications area and wildlife that use the area, and that he intends to do so regularly in the future. He testifies that he has health and aesthetic interests in the protection of air quality in the region that include, and that will be impacted by emissions from, the Lease Modifications area. Mr. Reed also testifies that he is harmed by the ugly industrial facilities at the West Elk Mine, a mine that whose life will be extended by nearly three years as a result of the lease modifications. He testifies that he has visited places adjacent to, and with views of, the Lease Modifications area for these purposes, and that he intends to return to those places to view the Lease Modifications area, enjoy the region's clean air, and enjoy the North Fork Valley's rural character.[28] Mr. Reed's declaration establishes that BLM's decision to approve the Lease Modifications will adversely affect his, and HCCA's, legally cognizable interests in clean air, health, recreation, aesthetic enjoyment, and conservation through road and well-pad construction, increased air pollution, extended life of the coal mine, and other environmental impacts that will result from mining that is reasonably foreseeable within the Lease Modifications area as a result of BLM's ROD. Mr. Reed's declaration thus establishes that HCCA will be adversely affected by BLM's Lease Modifications ROD.

In sum, each of the Appellants is a party to the case and will be adversely affected by BLM's decision to approve the Lease Modifications. They may properly maintain this appeal.

III. STANDARD OF REVIEW

Appellants seeking a stay must demonstrate that (1) the balance of harms weighs in favor of granting a stay, (2) the appellant is likely to succeed on the merits of the appeal, (3) irreparable harm to the appellant and resources is likely if a stay is not granted, and (4) the public interest favors granting a

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[27] The FEIS acknowledges that road and MDW pad construction for coal mining will, inter alia, destroy habitat through vegetation loss (FEIS (Exh. 2) at 123), impact aesthetic enjoyment and recreational opportunities (id. at 160), and result in emission of air pollutants (id. at 69-77).

[28] See Reed Decl. (Exh. 8) at ¶¶ 5-17.

stay. 43 C.F.R. § 4.21(b)(1). Appellants seeking a stay "bear[] the burden of proof to demonstrate that a stay should be granted." Id. § 4.21(b)(2).

This Board's review of BLM's decision "is de novo in scope because it is [the IBLA's] delegated responsibility to decide for the Department 'as fully and finally as might the Secretary' appeals regarding use and disposition of the public lands and their resources." Nat'l Wildlife Fed'n, 145 IBLA 348, 362 (1998) (citing 43 C.F.R. § 4.1).

IV. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS.

Appellants are likely to succeed on the merits of this appeal because the Final EIS upon which BLM relies violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(h). NEPA places an obligation on agencies "to consider every significant aspect of the environmental impact of a proposed action." Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983) (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978)). An EA or an environmental impact statement ("EIS") "is judged by whether it ... takes a hard look at the potentially significant environmental consequences of the proposed Federal action and reasonable alternatives." Bristlecone Alliance, 179 IBLA 51, 60 (2010) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)) (internal quotation marks omitted).

NEPA thus "facilitates informed decisionmaking by agencies and allows the political process to check those decisions." New Mexico ex rel. Richardson v. BLM, 565 F.3d 683, 703 (10th Cir. 2009). The purpose of this process is to ensure that an agency prepares a "coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 (9th Cir. 1998) (quoting Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371 (1989)).

A. The Final EIS Fails To Disclose The Direct, Indirect And/Or Cumulative Impacts Of Mining On Private And Adjacent Federal Land That Cannot Occur Without The Lease Modifications.

An EIS must analyze the direct, indirect, and cumulative impacts of a proposed action. Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1176 (10th Cir. 1999); see also 40 C.F.R. § 1508.25(c) (when determining the scope of an EIS, agencies "shall consider" direct, indirect, and cumulative impacts). Direct effects "are caused by the action and occur at the same time and place," while indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable ... [and] may include growth inducing effects." 40 C.F.R. § 1508.8; see also Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1174 (10th Cir. 2002), as modified on reh'g, 319 F.3d 1207 (10th Cir. 2003). Cumulative impacts are "the impact[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. Forest Service regulations define reasonably foreseeable future actions as "[t]hose Federal or non-Federal activities not yet undertaken, for which there are existing decisions, funding, or identified proposals." 36 C.F.R. § 220.3 (emphasis added).

Consistent with this law and caselaw, this Board has held that "BLM must address indirect effects, including reasonably foreseeable changes in land use or population density, provided those effects are caused by its action" and that Federal agencies are required "to consider the effects of *private* development where it is likely to be facilitated by Federal action, or at least made likely." Orion Energy LLC, 175 IBLA 81, 91 (2008) (emphasis in original) (quoting James Shaw, 130 IBLA 105, 113 (1994)). In Orion Energy, the Board remanded a BLM decision to approve a right-of-way that would foreseeably result in private land development because:

> The EA is devoid of any substantive information about, or meaningful analysis of, changes in land use, population growth, and their related effects on air and water and other natural systems, including ecosystems that are facilitated by and likely to result [on private lands] from the proposed agency action.

Id., 175 IBLA at 192.

The FEIS fails to properly disclose the direct, indirect, or cumulative impacts of the Lease Modifications on a number of resources.

The FEIS states that "the leasing and development of the lease modifications also allow for the production of 5.6 million tons of fee coal on adjacent [private] lands ... as well as an additional 3.3 million tons from existing adjacent federal coal reserves."[29] The FEIS confirms that coal on private lands and adjacent public lands cannot be accessed unless MCC wins the right to mine the Lease Modifications area: "Without the lease modifications, coal on existing federal leases and private lands would be bypassed because of current panel alignment on parent leases."[30] In a letter to the Forest Service, the owners of the private coal at issues agreed, stating: "If the two federal coal lease modifications are not approved, 977 acres of [private] land will not be mined, bypassing an estimated 5.6 million tons of coal extraction…."[31] The FEIS also concludes that mining the Lease Modifications coal will add 1.6 years to the life of the West Elk Mine, but that the Lease Modifications ROD will lengthen the mine's life by a total of 2.9 years because of the additional coal from adjacent private and federal land.[32] The Forest Service ROD explicitly predicts that coal from adjacent private and federal land will lengthen the mine's life by 1.4 years.[33]

Because mining of 8.9 million tons of coal on adjacent private and federal lands outside of the Lease Modifications area will not occur unless BLM approves the Lease Modifications ROD, the FEIS must analyze the impacts of this adjacent lands mining as an indirect impact of the Lease Modifications. Orion Energy LLC, 175 IBLA at 91. BLM's ROD causes, or at least makes more likely, coal mining on

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[29] FEIS (Exh. 2) at 54.

[30] Id. at 531 (emphasis added).

[31] See letter of H. Whitman, Mount Gunnison Fuel Co. (May 17, 2012) (emphasis added), attached as Exh. 13.

[32] FEIS (Exh. 2) at 54.

[33] Forest Service ROD (Exh. 6) at 7 ("The addition of the lease modification areas would add approximately 1.6 years to the permitted baseline on NFS lands, and an additional 1.4 years would be added due to probable associated activities on private lands and parent lease COC-1362 which would become accessible under this decision.").

adjacent private and federal lands, mining that would not otherwise take place absent the ROD. Id.; see also 40 C.F.R. § 1508.8. Further, given the geography of the Lease Modifications, the private land, and the orientation of the mining panels, MCC may be required to mine the private lands if it is to access the coal in the Lease Modifications.[34]

The FEIS itself appears, in some places, to recognize explicitly that mining of adjacent private land and federal coal is an indirect impact of the Lease Modifications decision. The FEIS quantifies the direct and indirect *economic benefit* of the Lease Modifications action as including the coal mined from adjacent private and federal lands outside the Lease Modifications area.[35] The FEIS also contains a cursory analysis of subsidence-related direct and indirect impacts from mining adjacent reserves.[36] The FEIS's evaluation of the impacts of mining of adjacent reserves made possible by the Lease Modifications for some resources demonstrates that the FEIS could have and should have disclosed the indirect impacts of off-lease mining for all resources likely to be impacted by such off-lease mining. See Davis v. Mineta, 302 F.3d 1104, 1123 (10th Cir. 2002) (finding NEPA analysis arbitrary and capricious in part because agency disclosed action's indirect impacts to some resources but not others); North Carolina Alliance for Transp. Reform v. Slater, 151 F. Supp. 2d 661, 697 (M.D. N.C. 2001) (finding EIS statements that indirect effects not caused by the project were contradicted by other EIS statements, "underscores the necessity of a complete analysis" of indirect impacts, and the agency's failure to comply with NEPA the need for complete analysis).[37]

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[34] Because the FEIS fails to contain a map showing the location of the private coal to be mined, or of MCC's planned orientation of the coal panels, is it impossible for the public or agency decisionmakers to understand how mining of the Lease Modifications and the private land are related. The failure to disclose such information violates NEPA's "hard look" mandate.

[35] FEIS (Exh. 2) at 190 (calculating socioeconomic impacts from the mining of all 19 million tons of coal over 2.9 years).

[36] Id. at 101-103 (analyzing impact on topography and other resources as direct or indirect effects).

[37] At an absolute minimum, NEPA required the FEIS to disclose and analyze the cumulative impacts of coal mining made possible outside of the Lease Modifications area as impacts to those lands also fall within the definition of reasonably foreseeable future actions. For some resources, the FEIS contains very cursory mention of impacts from these nearby operations as cumulative. See, e.g., FEIS (Exh. 2) at 104 (subsidence), 118 (water), 125 (vegetation), 161 (recreation). Regardless of whether they are direct,

The FEIS fails to do so.

First, and most troubling, the FEIS fails to contain the most basic information necessary to evaluate the effects of adjacent lands mining: where is this coal on adjacent lands, and where are the lands likely to be impacted by mining this coal? The FEIS contains no map or other information displaying the location of the additional minerals to be mined, and where those areas are in relation to the Lease Modifications. The FEIS states only vaguely that the federal leases from which additional coal will be mined are somewhere to "the north," and that the adjacent private land from which additional coal will be mined is to "the west."[38] What maps the FEIS includes show lands surrounding the Lease Modifications area, but fail to display any information at all concerning the location for the adjacent recoverable coal outside of the Lease Modifications.[39]

The failure to locate the area where coal mining outside the Lease Modification will occur is arbitrary and capricious given that the FEIS discloses to the nearest 100,000 tons the amount of coal that will be mined from adjacent private and public lands (5.6 million tons, and 3.3 million tons, respectively), and the private landowner identifies the precise acreage of private land containing coal that would be bypassed without the Lease Modifications (977 acres).[40] The FEIS is able to calculate the volume of coal to be removed from private or adjacent federal land. The FEIS makes assumptions about the precise number and configuration of underground panels from which MCC will mine coal to inform its evaluation of impacts within the Lease Modifications area, and MCC has divulged its proposal for such

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indirect, or cumulative, though, the Forest Service should have disclosed these impacts in sufficient detail to allow informed decision-making and public participation. Colo. Envtl. Coal., 185 F.3d at 1172, 1176. As described below, the mere mention of adjacent public and federal coal mining when analyzing impacts to a particular resources does not meet NEPA's standards for disclosure. See infra at 16-17.

[38] FEIS (Exh. 2) at 51.

[39] See, e.g., id. at 36, 89, 107, 119, 162, 169, 171. At least one map discloses that private land exists adjacent to the Lease Modifications area, see id. at 169, but that alone is clearly not enough to satisfy NEPA. The FEIS maps never disclose the location on private land of the 5.6 million tons of private coal to be mined.

[40] See supra at 11.

panels to the agency.[41] The FEIS also estimates, in the most general terms, the habitat type that may be bulldozed for roads and MDWs on private and adjacent federal land combined.[42] Yet despite containing data and analysis for impacts within the Lease Modifications area, the FEIS fails to show even generally from where on private or adjacent federal land the coal may be removed. The location and juxtaposition of the private coal and adjacent federal coal to be mined is critical for understanding the potential impacts of all of the mining when taken together on watersheds, forests, soil types, topography, wildlife, etc. What geology, streams, roads, ditches, trails, habitat, viewsheds, and other resources are found in these areas?

Without knowledge of the juxtaposition of the impacts within the lease modifications and those outside the lease modification that will occur as a result of this decision, neither the public nor the decisionmaker can understand whether specific watersheds, streams, habitats, roadless lands, and other resources are likely to see additional or magnified impacts. Subsidence impacts and the likely location of roads and MDW pads and the impacts of such construction are tied directly to the location of the coal to be mined. Yet the FEIS fails to disclose even generally the location of that coal or of the surface impace outside the Lease Modifications. The failure to provide such information violates NEPA.

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[41] FEIS (Exh. 2) at 51 ("This RFMP for the lease modifications assumes the coal in the E seam would be extracted from portions of five longwall panels trending northwest-southeast."). See also MCC, Map, Projected and Maximum E-Seam Mine Layout (July 23, 2010) (MCC map showing proposed mine panels under the Lease Modifications area), attached as Exh. 14.

[42] See FEIS (Exh. 2) at 121 ("For private lands and adjacent parent lease areas, a total of 63 additional acres of vegetation loss is estimated. Of this, there would be approximately 41 acres of oak, 19 acres of aspen, 2 acres of spruce/fir, and 2 acres of shrub types. It is estimated that vegetation loss on private and parent lease surface would consist of about 42 acres for MDWs and 21 acres for roads."). The FEIS states that "estimates for vegetation loss on adjacent private lands and parent lease acres were extrapolated using proportional acres of existing vegetation types." Id. So the Forest Service must have some idea of the extent of vegetation type – and thus the location – of the private land and federal lands outside the Lease Modifications areas where these impacts will occur. Yet the FEIS fails to disclose that information to the public. As described below, even this analysis is flawed since it lumps together impacts to adjacent private and public lands, without distinguishing where those disparate impacts will occur. See infra at 16-17.

In response to comments, the FEIS claims that it is simply impossible to determine the location of the impacts from additional mining on private and adjacent federal lands.[43] This is an arbitrary explanation, given that the entire FEIS is built around a reasonably foreseeable mine plan (RFMP) that makes precisely such assumptions for impacts within the Lease Modifications area. The FEIS does not – and cannot – explain why the FEIS could develop, and disclose the impacts of, a RFMP for lands within the Lease Modifications area but could not do the same for the adjacent private and federal lands likely to be mined as a result of the ROD. Requiring the agencies to disclose the location and extent of adjacent land coal mining, as well as the impacts of such mining, will not require a "crystal ball" inquiry any more than the rest of the EIS. This is especially so given that the location of MDW pads and roads at the West Elk Mine follows a generally regular pattern. The MDW pads are located at regular intervals in a linear fashion a set distance apart.[44]

The presence of an important population of imperiled Colorado River cutthroat trout on the adjacent private land underscores the importance of displaying where impacts on private lands will occur. A July 2012 map in the project record indicates the existence of a "Cutthroat Trout Conservation Population" in the southwest corner of Section 22, less than a half-mile from the southwest corner of the lease modification expanding COC-67232.[45] Private land directly adjacent to the Lease Modifications includes the watershed for East Minnesota Creek, as well as a portion of the Creek itself, where the Conservation Population is found.[46] Depending on the location of the 5.6 million tons of private coal to be mined under the selected alternative, road and MDW construction may occur next to East Minnesota Creek, causing sedimentation that harms the cutthroat population there. The fact that the FEIS fails to

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[43] FEIS (Exh. 2) at 531 ("At this leasing stage there are no mine plans approved for the private lands as they rely solely on a preliminary design as is the case on the lease modification areas, so it is impossible to determine exactly where, of [sic] if, surface disturbance would occur.").

[44] See, e.g., id. at 171 (map displaying location of E-Seam drainage wells drilled to date).

[45] Compare id. at 162 with U.S. Forest Service Map, Cutthroat Trout Conservation Population in Relationship to Lease Modification Project Area (July 19, 2012), attach as Exh. 15.

[46] Id.

even mention the native population of Colorado River cutthroat in this stream shows that the agency has failed to take the "hard look" at indirect impacts that NEPA requires.

Second, where the FEIS purports to address the impacts of mining on adjacent private and public lands, it does so only in a most cursory and un-illuminating way that fails to meet NEPA's "hard look" mandate. For example, in its discussion of potential subsidence impacts, the FEIS estimates subsidence from private and adjacent Federal lands combined.

> If the tracts are leased, subsequent underground longwall mining would cause approximately 1500 acres of subsidence (~950 acres from mining COC-1362, ~150 acres from mining COC-67232, and ~400 acres from mining adjacent reserves in existing federal leases and adjacent private lands).[47]

This statement lumps together subsidence information for both the private and adjacent public lands, though it FEIS fails to provide any explanation for doing so. Further, the FEIS provides no information disclosing where this subsidence is likely to occur. Will it occur under major roads? Near watersheds already burdened by other impacts? The FEIS's failure to disclose the location of subsidence is particularly striking because the Draft EIS contained a map that, though it is hardly clear, displays subsidence impacts on the lease modification areas and adjacent Federal and private land.[48] Without explanation, the Forest Service omitted that map, entitled "Projected subsidence," from the FEIS.

Similarly, while the FEIS estimates the total acreage of ground disturbance likely to accompany MDW pads and road construction on private and adjacent public lands outside of the Lease Modifications – 42 acres for MDW pads and 21 acres for roads to access them – the FEIS again fails to display even

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[47] FEIS (Exh. 2) at 91. The FEIS makes similarly vague representations in numerous other locations when purporting to assess the direct and indirect impacts of the Lease Modifications. See id. at 100, 101, 109, 111, 113-14, 115, 116, 160, 185-86.

[48] U.S. Forest Service, Draft Environmental Impact Statement, Federal Coal Lease Modifications COC-1362 & COC-67232 (May 2012) at 50 ("DEIS"), excerpts attached as Exh. 16. The Draft is available online at http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/68608_FSPLT2_126547.pdf (last viewed Jan. 28, 2013). This map does not help the viewer understand which subsidence impacts may be attributable to the Lease Modifications ROD, since the "area of predicted subsidence" depicted continues off the map to the north and east.

generally where these impacts are likely to occur.[49] This is best illustrated where the FEIS addresses the impact of mining activities on adjacent lands together with the effects from the Lease Modifications under the various alternatives as a "cumulative" impact. That "analysis" is limited to the following vague statement that is cut-and-pasted throughout the FEIS:

> If the lease modifications are granted[,] effects similar to those described in Alternative 2, 3, and 4 could occur on the adjacent private land while mining 5.6 million tons of private coal reserves and on parent leases where additional 3.3 million tons federal coal reserves may be mineable. Postlease surface disturbances associated with mining those lands is estimated to be approximately 63 acres (42 acres of MDW pads, and 21 acres of MDW access).[50]

But without reference to the slope, soil type, streams and ponds, or visual values of the private or adjacent lands, or even the location of the lands impacted, the Forest Service can have no support for its contention that the impacts outside of the Lease Modifications will be "similar." Because the FEIS fails to inventory or describe the resources at stake on the adjacent lands, or even provide an idea for where those lands are, the FEIS fails to take the required "hard look" at the ROD's direct, indirect, or cumulative effects.

Further, the FEIS again fails to split out on which lands the MDW pads and roads are likely to occur – private or Forest Service land – instead lumping all the impacts together. The FEIS does so despite the fact that it is likely that the private and public lands outside the lease modifications that can be mined are miles from each other.

Third, the FEIS calculates air quality impacts by assuming that the West Elk Mine's current emission rates would extend for an additional 1.6 years due to the lease modifications.[51] But the Lease

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[49] See FEIS (Exh. 2) at 92.

[50] Id. at 104 (discussing cumulative impacts on soils); see also id. at 92 (making nearly identical statement re: topographic and physiographic environment); id. at 97 (making nearly identical statement re: geology); id. at 118 (making nearly identical statement re: watersheds); id. at 161 (making nearly identical statement re: recreation); id. at 125 (making nearly identical statement re: vegetation); id. at 186 (making nearly identical statement re: visual resources).

[51] Id. at 81 ("direct, indirect, and cumulative" air pollution impacts of lease modifications would be the same as that of the no action alternative "except that [pollution] would continue for an additional 1.6 years").

Modification will extend the life of the Mine for an additional 2.9 years when mining of the private and federal lands outside the Lease Modifications is taken into account.[52]

Fourth, the FEIS fails to properly disclose the impacts of adjacent mining operations on the threatened Canada lynx and other sensitive species. While conceding that the construction of MDWs and grazing could alter vegetation on private land, the FEIS asserts that these lands are "already modified through long-term human use."[53] This overlooks the possibility, however, that subsidence or methane drainage facilities and new roads on private or adjacent public land may impact lynx habitat. Additional data in one table in the FEIS may address the potential for alteration of lynx habitat. But Table 3.10a is hardly clear. It contains data not disclosed in prior analyses indicating that in addition to the estimated 75 acres of disturbance of suitable lynx habitat within the Lease Modifications area, it is "foreseeable" that 10 acres of suitable lynx habitat on private lands will be affected, and similarly "foreseeable" that 7 acres of suitable lynx habitat on "Parent Lease COC-1362" will be impacted by surface impacts.[54] The FEIS does not disclose how the Forest Service arrived at these numbers. Nor are these figures reflected in the FEIS's narrative of the Lease Modifications' direct, indirect and cumulative impacts to lynx; the FEIS continues to assume that the Lease Modifications will only result in the direct loss of up to 75 acres of suitable lynx habitat within the Lease Modifications area.[55] The FEIS also lacks any discussion of the effects of mining on adjacent lands on habitat for sensitive species, whereas the FEIS often provides specific numbers of acres of habitat that may be lost within the lease modifications.[56]

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[52] See id. at 54 (lease modifications would extend the life of the mine by 2.9 years). While the FEIS, in responses to comments, asserts that the cumulative effects section of the air quality analysis "addresses the duration of the lease modifications plus additional reserves on federal and fee lands," id. at 516, the Forest Service made no relevant changes to the text of the FEIS, which fails to account for the extension of air pollution due to the mining of lands outside the Lease Modifications.

[53] Id. at 131.

[54] Id. at 127-28.

[55] See id. at 129, 130.

[56] See, e.g., id. at 138 (project will result in loss of 68 acres of northern goshawk habitat; figure omits potential loss of habitat on private or adjacent lands); id. at 139 (similar analysis for boreal owl); id. at 141 (similar analysis for olive-sided flycatcher); id. at 142 (similar analysis for flammulated owl); id. at 146 (similar analysis for purple martin).

Given the fact that adjacent lands contain nearly as much coal as the Lease Modifications themselves (8.9 million tons on adjacent lands, compared to 10.1 million tons within the Lease Modifications) and that mining these adjacent lands would almost double the extension of mining operations (from 1.6 years to 2.9 years), the FEIS cannot ignore the direct, indirect, or cumulative impacts from nearby mining as insignificant. Nor would it be burdensome to consider these impacts in greater depth, since the impacts of mining adjacent lands are supposedly "similar" to those caused by mining within the Lease Modifications.[57]

Whatever the burden, NEPA requires the Forest Service to disclose the direct, indirect, and cumulative impacts of a proposed action. The FEIS's failure to analyze the impacts of mining an additional 8.9 million tons of coal outside the Lease Modifications – impacts that result directly or indirectly from the Lease Modification decision – fails to take the hard look at such impacts, violating the mandates of NEPA and this Board.

B. The FEIS's Socioeconomics Analysis Arbitrarily Fails To Account For The Lease Modifications' Impacts While Inflating Alleged Benefits.

Regulations implementing NEPA require that the action agency disclose the direct, indirect, and cumulative effects of actions, including "economic, [and] social" impacts. 40 C.F.R. § 1508.8. In addition, while NEPA does not require a specific cost-benefit analysis, regulations require that when an agency prepares such an analysis that it "discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities." 40 C.F.R. § 1502.23. Federal courts have struck down NEPA documents because economic and socio-economic benefits were not properly quantified. See, e.g., Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983) (setting aside analysis that presented project benefits but not costs). An analysis that overstates the economic benefits of a project fails in its purpose of allowing decisionmakers to balance environmental harms against economic benefits. Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 446-48 (4th Cir. 1996) (setting aside EIS). Similarly, an EIS that relies upon misleading economic information may violate

[57] See supra at 17.

NEPA if the errors subvert NEPA's purpose of providing decisionmakers and the public an accurate assessment upon which to evaluate the proposed project. Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987).

Federal courts have also specifically set aside agency action where the agency failed to account for the social cost of carbon. See, e.g., Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172 (9th Cir. 2008) (agency cost-benefit analysis violated Energy Policy and Conservation Act where the agency assigned a monetary value of zero to the benefits of reduced greenhouse gas emissions).

1. The FEIS Arbitrarily Fails To Account For The Socioeconomic Impacts Of The Lease Modifications.

The Draft EIS contained a section analyzing the impacts of various alternatives on socioeconomics.[58] This section contained a sub-section entitled "Benefit-Cost Analysis" for each of the action alternatives.[59] In that analysis, the Draft EIS estimated the following benefits:

- The value of coal recovered (in $);
- The value of payroll (in $);
- The value of materials, supplies and services purchased (in $); and
- The value of royalties (in $).[60]

The Draft EIS considered two potential "costs":

- The cost of greenhouse gas (GHG) emissions (in $, based on a per-ton social cost of CO_2 as estimated by an Interagency Working Group study estimating the "social cost of carbon"); and
- "Minor costs due to 72 acres of disturbance on National Forest System Lands (resulting in temporary impacts to hunting, recreation, aesthetics, and livestock grazing)."[61]

BLM included a virtually identical analysis in its preliminary EA.[62]

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[58] DEIS (Exh. 16) at 147-52 (Sec. 3.33).

[59] Id. at 151-52.

[60] Id.

[61] Id. at 152.

Several commenters took issue with the Draft EIS's (and BLM EA's) analysis of costs and benefits. Appellants here argued that the Draft EIS's analysis of socioeconomics was flawed because, inter alia, it failed to consider the costs of carbon produced by coal combustion, and that the Draft EIS used a figure for the social cost of carbon that was too low.[63] Attorneys representing Mountain Coal Company also argued that the agencies should address the costs of coal combustion, though they suggested that coal combustion might have offsetting benefits.[64]

In response, the FEIS modified its evaluation of the project's benefits by adding new information about the project's economic benefits. The FEIS retains all of the estimates of the project's alleged economic benefits provided in the Draft EIS – precisely providing numbers for the value of: coal recovered; payroll; materials, supplies and services purchased; and royalties.[65] The FEIS also includes new information concerning direct economic benefits, the value of bonus bids, and rental payments.[66]

But rather than justify or improve its analysis of socioeconomic harms, the Forest Service responded by completely eliminating any estimate of costs from the FEIS's analysis of the alternatives' economic impacts.[67] Where the Draft EIS estimated the costs of the socioeconomic harms of carbon in line with a federal interagency task force report, the FEIS's entire discussion of costs is narrative and incomplete:

> Social and economic costs associated with this alternative are primarily due to the 72 acres of disturbance on National Forest System Lands, resulting in temporary impacts to recreation, hunting, aesthetics, wilderness character, and grazing. However, these impacts are expected to be minimal and short-term.[68]

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[62] BLM EA (Exh. 3) at 49.

[63] See letter of E. Zukoski (Exh. 5) at 51-53; FEIS (Exh. 2) at 536-38 (reprinting relevant section of HCCA comment letter).

[64] FEIS (Exh. 2) at 538-39 (reprinting comments of M. Drysdale).

[65] Id. at 188.

[66] Id. at 188-91.

[67] See id. at 189-91.

[68] Id. at 191.

This discussion is essential the same, truncated narrative of non-GHG costs associated with the Lease Modifications in the Draft EIS. The FEIS contains no explanation for the omission of the social costs of carbon, despite the fact that in its response to comments on the Draft EIS, the agency promised that "[a]dditional information has been added to FEIS to reflect social costs of coal and coal combustion," and that "social costs were discussed in the FEIS (Section 3.33)."[69] But neither the FEIS in general, nor the section of the FEIS the response to comments cites specifically, contains any analysis at all of socioeconomic impacts attributable to GHG emissions. The words "social cost" appear nowhere in the FEIS except in the responses to comments. In sum, the FEIS only considers the alleged economic benefits of coal mining and combustion, but not one of the largest and most obvious impacts.[70]

The FEIS's myopic analysis – considering and quantifying only alleged economic and social benefits but ignoring relevant harms and costs – improperly skews BLM's inquiry, and ignores NEPA's mandate to take a hard look at all of the impacts of each of the alternatives. The FEIS contains not a hard look, but at most a biased look at one side of the equation of the project's socioeconomic impacts. The FEIS's elimination of the information concerning the socioeconomic costs of greenhouse gas pollution without explanation is arbitrary and capricious. It is also arbitrary given that the BLM has identified climate change, including greenhouse gas emissions causes by carbon combustion, as one of just six "BLM Key Issues" for evaluation and analysis during the NEPA process.[71]

The complete elimination of analysis of the social costs of carbon is particularly troubling given that the costs of carbon for the proposed lease modifications apparently outweigh the project's direct economic impacts. The FEIS discloses that combusting one year of coal from the West Elk Mine will result in, at a minimum, 18.2 million tons of CO_2 pollution. [72] The selected alternative will result in the

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[69] Id. at 536 (emphasis added), 539 (emphasis added).

[70] Id. at 189-91.

[71] BLM ROD (Exh. 1) at 8.

[72] FEIS (Exh. 2) at 80 (Table 3.3k). The FEIS suggests that its CO_2 emissions estimates may be high because technical fixes may reduce such emissions. See id. at 79 ("a power plant that is equipped with selective catalytic reduction or practices CO_2 capture would ultimately release much smaller quantities of

mine operating an additional 2.9 years, resulting in a minimum of 52.78 million tons of CO_2 emissions for the life of the project.[73] Assuming, as the Draft EIS does, that the social cost of carbon is $21 per ton of CO_2 emissions, the social cost of carbon emitted by coal combustion made possible by the ROD is $1.11 billion.[74] By this measure, the costs borne by society for coal combustion resulting from the Lease Modifications – $1.11 billion – is greater than the FEIS's estimate of $1.08 billion for the Lease Modifications' direct economic impacts.[75]

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nitrogen oxides and CO_2 than a power plant lacking such controls." (emphasis added)). But selective catalytic reduction (SCR) measures do not reduce CO_2 reduce emissions, nor are we aware of any power plant in the country that has put in place, or that proposes to put in place, successful carbon capture technology. EPA has prepared a series of technical "white papers" summarizing available and emerging technologies to reduce GHG emissions in various industrial sectors. EPA never once suggests that SCR is a GHG control technology at power plants or large industrial boilers that combust coal. See, e.g., http://www.epa.gov/nsr/ghgpermitting.html (last viewed Jan. 28, 2013). The FEIS provides no basis for its conclusion.

[73] FEIS (Exh. 2) at 190 (selected alternative will extend mine life by 2.9 years).

[74] See DEIS (Exh. 16) at 151, 152 (assuming social cost of carbon is $21 per ton). 18.2 million tons of CO_2 / year * 2.9 years * $21 per ton of CO_2 = $1.108 billion.

Economists have argued that the social cost of carbon is far greater than the $21 per ton of CO_2 assumed by the DEIS. See E. Zukoski to Forest Service (Exh. 4) at 51-53. See also F. Ackerman & E. Stanton, Climate Risks and Carbon Prices: Revising the Social Cost of Carbon (2010) (the social cost of carbon could be over $800 per ton of CO_2 equivalent), attached as Exh. 17; F. Ackerman & E. Stanton, Climate Risks and Carbon Prices: Revising the Social Cost of Carbon, *in* Economics, vol. 6 (Apr. 4, 2012) (reaching similar conclusions), available online at http://www.economics-ejournal.org/economics/journalarticles/2012-10 (last viewed Jan. 28, 2013), attached as Exh. 18; P. Epstein et al., Full cost accounting for the life cycle of coal, Ann. N.Y. Acad. Sci. (2011) (estimating the social cost of coal at between $10 and $100 per ton of CO_2 equivalent), attached as Exh. 19; L. Johnson & C. Hope, The social cost of carbon in U.S. regulatory impact analyses: an introduction and critique, J. Envtl. Stud. & Sci. (Sept. 9, 2012) (finding a social cost of a ton of CO_2 emissions to be 2.6 to over 12 times larger than the Interagency Working Group's central estimate of $21 per ton of CO_2) available online at http://link.springer.com/article/10.1007%2Fs13412-012-0087-7 (last viewed Jan. 28, 2013), attached as Exh. 20.

In any event, the cost of carbon is projected to rise over time. In a recent rulemaking, the Department of Transportation and EPA assumed the social cost of CO_2 was $23 per ton in 2012, and would reach $25 per ton in 2015, and $26 per ton by 2017. See Environmental Protection Agency (EPA) and National Highway Traffic Safety Administration (NHTSA), Final Rule, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, 77 Fed. Reg. 62,624, 63,005 (Oct. 15, 2012) (assuming 3% discount rate). Coal from the Lease Modifications would likely be mined from 2013 to 2016, FEIS (Exh. 2) at 190, and thus delivered to market and combusted at about the same time. The social cost of carbon for the combustion of Lease Modification coal, using the DOT and EPA figures, should thus be between $23 and $26 per ton.

[75] See FEIS (Exh. 2) at 190.

But even this figure for social costs of carbon is low. First, this figure addresses only the cost of carbon combustion, omitting the more than 1.1 million – 3.6 million tons of additional CO_2-equivalent omissions that will likely result from the Lease Modifications' methane pollution.[76] Second, the $1.11 billion figure is based of the cost of carbon remaining a constant $21 per ton of CO_2 over the three- to four-year period the coal will be mined and subsequently combusted. This ignores the fact that the interagency study relied on by the Draft EIS – and other studies – predict that the social cost of carbon will rise, to $24 per ton in 2015 according to EPA.[77] Third, as Appellants noted in their comments on the DEIS, the social costs of carbon are likely far higher than those predicted by the interagency study the DEIS relies on, according to several analysis that the agency neither acknowledges nor responds to.[78]

Since the Draft EIS estimated the tons of CO_2 equivalent from methane pollution and coal combustion, it easily could have, and should have, weighed the Lease Modifications' economic benefits – which the FEIS carefully catalogues in narrative form, numerically by dollar amount, and in a table[79] – against the project's considerable, and perhaps even greater, harms. To identify and analyze just the value of the project's economic benefits while ignoring its calculable, and considerable, costs – something

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[76] The FEIS states that the West Elk Mine released 1.23 million tons of CO_2 equivalent of methane in 2011. See id. at 75, 506. Assuming a similar amount is emitted over the 2.9 years that the Lease Modifications will add to the mine's life, total CO_2 methane emissions over the project's life are 3.58 million tons of CO_2e.

Elsewhere, the FEIS estimates that "383,250- 574,875 tonnes of CO_2 equivalent [of methane are] released per year based on ongoing mine activities." Id. at 40. Assuming this lower figure is correct, total CO_2 equivalent of methane emissions over the 2.9 years that the Lease Modification will add to the mine's life are 1.11 million to 1.21 million tons CO_2e. The FEIS never explains the disparity between the 2011 observed CO_2e emissions and the projected emissions over the Lease Modifications' life, itself a violation of NEPA.

[77] See supra note 74. See also Interagency Working Group on Social Cost of Carbon, Technical Support Document (Feb. 2010) at 1, 28 (at 3% discount rate, concluding social cost of CO_2 would reach $23.80 per ton in 2007 dollars by 2015, an increase from the social costs in 2010 of $21 per ton), available online at http://www.epa.gov/otaq/climate/regulations/scc-tsd.pdf, and attached as Exh. 21.

[78] See supra note 74.

[79] See FEIS (Exh. 2) at 188-92.

the agency began to do in the DEIS – fundamentally corrupts the NEPA process. Hughes River Watershed Conservancy, 81 F.3d at 446-48; Oregon Envtl. Council, 817 F.2d at 492 (9th Cir. 1987).[80]

The FEIS's failure to address the socioeconomic harms of carbon combustion and methane pollution also violates NEPA because the agency fails to address or respond to scientific studies showing the cost of carbon are higher than zero, which the FEIS apparently assumes, not to mention higher than the interagency study upon which the Draft EIS initially relied. NEPA requires agencies to explain opposing viewpoints and their rationale for choosing one viewpoint over the other. 40 C.F.R. § 1502.9(b) (requiring agencies to disclose and discuss responsible opposing viewpoints). See also Ctr. for Biological Diversity v. U.S. Forest Serv., 349 F.3d 1157, 1168 (9th Cir. 2003); Silva v. Lynn, 482 F.2d 1282, 1285 (1st Cir. 1973) (the NEPA requirement to prepare an EIS "helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."); Sierra Club v. Eubanks, 335 F. Supp. 2d 1070, 1076 (E.D. Ca. 2004) ("[c]redible scientific evidence that [contradicts] a proposed action must also be evaluated and considered."); Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1318 (W.D. Wash. 1994) ("[the EIS] must also disclose responsible scientific opinion in opposition to the proposed action, and make a good faith, reasoned response to it."); Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992) ("[t]he agency's explanation is insufficient under NEPA – not because experts disagree, but because the FEIS lacks reasoned discussion of major scientific objections."); Friends of the Earth v. Hall, 693 F. Supp. 904, 936-37 (W.D. Wash. 1988) (finding EIS inadequate because it addressed contrary scientific evidence and criticism in an appendix rather than in the body of the EIS). By sweeping under the rug the entire issue of the Lease Modifications' socioeconomic costs, and ignoring the many studies showing such harms are real and quantifiable, the FEIS fails to address these studies, in violation of NEPA.

[80] The FEIS, without explanation, fails to account for another cost: the loss of a federally owned mineral resource – natural gas – which, if captured, could result if the methane were not wasted to facilitate coal mining. See E. Zukoski to Forest Service (Exh. 4) at 52.

BLM cannot argue that it may ignore the socioeconomic harms from carbon emissions because such costs are difficult to determine. Regulations implementing NEPA state that if information relevant to a comparison of the alternatives is "incomplete or unavailable," the agency "shall" obtain the data if the "overall costs" of doing so "are not exorbitant." 40 C.F.R. § 1502.22(a). Here, the overall costs of estimating the social costs of carbon are small; the agency must simply estimate CO_2 pollution from mining and combusting and use a defensible figure for the social cost of CO_2 per ton. All of these estimates are readily available to the action agencies, including BLM.

Further, even if the overall costs of estimating the socioeconomic costs of carbon were exorbitant, "or the means to obtain [such information] are not known," the FEIS must include:

> (1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

40 C.F.R. § 1502.22(b). The FEIS contains none of these statements; it simple omits the relevant information concerning the costs of carbon. This omission violates NEPA.

In its ROD, BLM provides a two-sentence statement for failing to disclose or assess the socioeconomic harms from greenhouse gas pollution. BLM does not address NEPA's criteria for addressing "incomplete or unavailable" information, although it identified climate change as a "key issue" for evaluating alternatives. Nor does BLM respond to or acknowledge those federal agency and other experts who have found it possible and helpful to predict the socioeconomic costs of greenhouse gas pollution. In response to comments, the ROD states:

> In response to public comment and further agency analysis, the benefit-cost analysis was removed from the FEIS because it was determined not to provide accurate analysis to inform USFS and BLM decisions. The economic impacts of all alternatives were instead addressed without the benefit-cost analysis.[81]

[81] BLM ROD (Exh. 1), App. B, at 2.

This explanation is arbitrary and capricious. Nothing in the FEIS supports this conclusion. Further, while BLM states that the "benefit-cost analysis was removed from the FEIS because it was determined not to provide accurate analysis," BLM provides no statement as to why it reached this conclusion, or what part of the analysis was found to be "not accurate." BLM's rejection of any attempt to assess the socioeconomic harms of greenhouse gas pollutants as "not … accurate" is also arbitrary because it rejects all protocols for evaluating the social costs of carbon, including the one developed with the assistance of: the Council on Environmental Quality, which oversees NEPA compliance; the Department of Agriculture, the parent department of the U.S. Forest Service; the Environmental Protection Agency, which regulates greenhouse gas emissions; and nine other departments and agencies.[82] BLM does not explain why a protocol those agencies developed for the purposes of evaluating federal agency rulemakings is not "accurate" enough for BLM. Further, other federal agencies, including the Department of Transportation and EPA, routinely assess the socioeconomic costs of carbon pollution while analyze the environmental and economic benefits and harms of rulemakings.[83]

BLM's statement that the "economic impacts of all alternatives were instead addressed without the benefit-cost analysis" ignores the fact that the FEIS did analyze and quantify the socioeconomic benefits; it simply chose to not quantify, ignore, and dismiss the socioeconomic costs of the Lease Modifications.

This Board cannot excuse the omission of the economic and social costs on these grounds, nor can the Board condone the lack of such evaluation as mere nit-picking by Appellants. The Lease Modifications' economic costs and benefits were at the core of the Forest Service's and BLM's choice among alternatives. Colorado BLM State Director Hankins specifically adopted the Forest Service's reasons for approving the ROD.[84] In making her decision on the Lease Modifications, Forest Supervisor

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[82] Interagency Working Group on Social Cost of Carbon (Exh. 21) at cover page.

[83] See, e.g., EPA and NHTSA, Final Rule, 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions, 77 Fed. Reg. at 62,624, 63,005.

[84] BLM ROD (Exh. 1) at 5 ("The BLM concurs with the rationale ("Reasons for the Decision") presented in the USFS ROD [for] the selection of Alternative 3").

Sherry Hazelhurst relied heavily on the project's alleged, estimated social and economic benefits, despite the fact that she had chosen to ignore or leave undisclosed the social and economic harms of greenhouse gas pollution. For example, the Supervisor states in the Forest Service's ROD that she did not adopt the "no action" alternative because "it does not achieve social and economic objectives in the area. Estimates suggest nearly a billion dollars in lost revenues, royalties, payroll and local payment for goods and services would be foregone by implementing this Alternative."[85] Similarly, in justifying the agency's selection of Alternative 3, the Supervisor states: "I determined that the economic benefits of Alternative 3 outweigh the environmental effects of disturbing a small amount of NFS lands for a short period of time as assessed in Alternative 4."[86] Here, the Supervisor states that she based her decision in comparing the chosen Alternative 3 with the more protective Alternative 4 on a lack of any additional costs of Alternative 3 other than land disturbance in the Lease Modifications area, failing to factor in the additional costs of CO_2 emissions under Alternative 3.

Because the FEIS never analyzed the considerable social and economic harms of the Lease Modifications, and did so without explanation after beginning such an analysis in the Draft EIS, the most important basis for the agency's choice of alternatives was flawed, arbitrary and capricious.

2. The FEIS Arbitrarily Inflates The Economic Benefits Of Royalties And Coal Sales.

The FEIS not only entirely omits the costs of the Lease Modifications, it also appears to overstate the benefits. For example, the FEIS assumes that the Lease Modifications' benefits include an "Annual Royalty @ 8%."[87] But MCC long ago announced that it was seeking to reduce from 8% to 5% the level of royalties paid to the taxpayer for the lease that are the subject of the Lease Modifications, a reduction

[85] FS ROD (Exh. 6) at 9 (emphasis added).

[86] Id. at 10.

[87] FEIS (Exh. 2) at 188. See also id. at 190 ("Royalty payments are 8% of the value of the coal removed" and assuming total value of royalties will therefore be "approximately $30 million").

BLM approved for the years 2010-2015.[88] That royalty reduction applies to the mining the E-Seam in leases COC-1362 and COC-67232 where that seam contains a "parting" of high ash and rock content of more than 6 inches. BLM "believes the split coal will continue to affect operations for the remainder of the mine life," although it will reevaluate conditions in 2015.[89]

This decision impacts royalties for the Lease Modifications decision at least three ways. First, it will apply to the Lease Modifications when adopted, since it applies to the two parent leases at issue. Second, it applies to the 3.3 million tons of coal on federal lands adjacent to the Lease Modification areas, which includes lands in the parent lease COC-1362 where the royalty reduction now applies.[90] BLM predicted that MCC would mine the coal in and adjacent to the Lease Modifications starting in 2013 through 2016; the recently adopted royalty reduction will apply during much of that period.[91] Third, BLM "believes" that the condition upon which the royalty reduction was based – the "parting" of the E-Seam – will "continue to affect operations for the remainder of the mine life," meaning that it is likely that the royalty reduction will remain in place until the E-Seam – including the Lease Modifications area – is completely mined.

The royalty reduction, current and expected, reduces the financial benefits from royalties by 37.5%. The FEIS's assumption that this project will include result in about $30 million in royalties is therefore arbitrary and capricious.[92]

In its ROD, BLM responds that the agency is not permitted to put in place "preemptive reductions on areas that have not been proven" to meet the conditions for royalty reductions."[93] This response is

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[88] A. Johnson, Mining officials hope for longer lease on life for West Elk Mine, Crested Butte News (Apr. 25, 2012) (Arch Coal has "ask[ed] the Bureau of Land Management for a reduction in the royalty rate to 5 percent from 8 percent"), attached as Exh. 22; Bureau of Land Management, Decision (Sep. 14, 2012), attached as Exh. 23.

[89] BLM Decision (Sep. 14, 2012) at 2 (Exh. 23) (emphasis added).

[90] FEIS (Exh. 2) at 188 (assuming mining of 3.3 million tons of recoverable coal on parent lease COC-1362).

[91] Id. at 190.

[92] Id. at 188 (assuming royalty rate of 8%); BLM EA (Exh. 3) at 49 (same).

irrelevant and incorrect. As discussed above, the royalty rate reduction will impact royalties on the parent lease and within the modifications until February 2015, by which time much of the coal within the Lease Modifications and on adjacent federal leases will likely have been mined. Further, BLM "believes" the conditions on which BLM justified the current royalty reduction is likely to persist for the rest of the mine's life. NEPA requires BLM to assess and predict reasonably foreseeable impacts. BLM cannot assume for its NEPA analysis a higher, 8% royalty rate when the lower royalty rate will apply to much of the Lease Modifications' life and when the State Director has announced the agency's "belief" that the royalty rate reduction will continue for the entirety of the time the Lease Modifications will be mined. BLM's assumption of an 8% royalty rate skews BLM's analysis and misleads the public and decisionmakers, in violation of NEPA's "hard look" doctrine.

C. The Final EIS's Analysis Of Cumulative Impacts Violates NEPA.

In evaluating cumulative impacts, agencies must do more than catalogue relevant "past projects in the area." City of Carmel-by-the-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1160 (9th Cir. 1997). An EIS must also include a "useful analysis of the cumulative impacts of past, present and future projects." Id. This means a discussion and an analysis in sufficient detail to assist "the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative environmental impacts." Id. (citation omitted). Agencies also cannot merely list the number of road miles to be built or acres disturbed by past, present, and foreseeable projects. Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 994-95 (9th Cir. 2004) ("A calculation of the total number of acres to be harvested in the watershed is … not a sufficient description of the actual environmental effects that can be expected from logging those acres…. Moreover, while a tally of the total road construction anticipated in the … watershed is definitely a good start to an adequate analysis, stating the total miles of roads to be constructed is similar to merely stating the sum of the acres to be harvested – it is not a description of actual environmental effects.").

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[93] BLM ROD (Exh. 1), App. B at 3.

1. The FEIS's Analysis Of Cumulative Impacts Violates NEPA.

The FEIS's cumulative effects section, Section 3.37, largely consists of a list of present and reasonably foreseeable actions as well as "other activities."[94] There is almost no evaluation of what the impacts of those projects might be. For example, the FEIS's description of Bull Mountain Unit drilling discloses only that surface impacts will occur; the FEIS does not address potential air quality impacts, nor does it explain how air or surface impacts will affect the environment when taken together with impacts of the Lease Modifications.[95] And while the FEIS's cumulative effects section states that "[a]ll cumulative effects are addressed specific to each resource in [other sections of the FEIS's] Chapter 3," those resource-specific cumulative impacts analyses also contain little to none of the information required by NEPA.[96] For example, for the expected oil and gas drilling in the Bull Mountain Unit, the FEIS identifies the number of wells to be drilled (150), and acknowledges that "[c]umulative effects would be expected as they relate to criteria air pollutants and visibility within the airshed."[97] And while the air quality effects section mentions the Bull Mountain Unit, it does so only to admit that it would add air pollutants, but then declines to even attempt to estimate or quantify such impacts, merely concluding summarily that "emissions cannot yet be quantified."[98] Similarly, while the FEIS acknowledges the potential for cumulative effects when viewing the Lease Modifications together with the Oak Mesa coal exploration project ("cumulative effects could be expected as they relate to additional vegetation/habitat disturbance"),[99] the only other mention of Oak Mesa is the area of the project and the footprint of road and pad construction.[100] The FEIS fails to analyze the potential for that project to impact air quality or any other value when examined together with the impacts of the Lease Modifications.

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[94] FEIS (Exh. 2) at 193-95.

[95] Id. at 195.

[96] Id. at 193

[97] Id. at 50.

[98] Id. at 71.

[99] Id. at 50

[100] Id. at 194.

The FEIS's analysis of cumulative effects therefore does not meet the standard set by NEPA or the courts.

2. The FEIS's Analysis Of Cumulative Impacts Of The Lease Modifications, Together With Oil And Gas Leasing Violates NEPA.

The FEIS fails to assess and disclose properly the impacts of the Lease Modifications when those impacts are viewed cumulatively with the impacts of oil and gas leasing proposed for the North Fork Valley. BLM released its environmental assessment on the February 2013 Oil and Gas Lease Sale ("2013 Lease Sale EA") in November 2012, before it adopted the Lease Modification FEIS in the agency's December 27, 2012 ROD.[101] BLM recognized the necessity for analyzing the impact of these two actions together; it identified "consider[ing] lease action [for coal] with other reasonably foreseeable actions in [the] North Fork Valley" as one of the agency's "Key Issues" for the NEPA process for the Lease Modifications.[102]

First, BLM's 2013 Lease Sale EA's cumulative effects analysis illustrates deficiencies in the Lease Modification FEIS. The 2013 Lease Sale EA contains a defined "cumulative impacts area of influence," and provides the public and the decisionmaker with a map displaying the area.[103] The 2013 Lease Sale EA thus provides the reader with certainty which projects besides the lease sale may, together with the lease sale, have cumulative impacts. By contrast, the FEIS contains no map depicting such an area of influence, and for most resources the FEIS fails to discuss the extent of such impacts. While the FEIS does analyze the cumulative impacts to wildlife together with other impacts in a defined area – the Mount Gunnison Lynx Analysis Unit – the FEIS not only fails to provide a map of this area, it provides

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[101] BLM, February 2013 Oil and Gas Lease Sale for the Uncompahgre Basin Resource Area (DOI-BLM-CO-S050-2012-0009-EA) (Nov. 16, 2012) ("2013 Lease Sale EA"), available online at http://www.blm.gov/pgdata/etc/medialib/blm/co/information/nepa/uncompahgre_field/12-09_august_og_lease/2012-1116_12-09_lease0.Par.0143.File.dat/FINAL2012-09_EA_16NOV2012.pdf (last viewed Jan. 28, 2013), excerpts attached as Exh. 24.

[102] BLM ROD (Exh. 1) at 9.

[103] 2013 Lease Sale EA (Exh. 24) at 23.

little if any rationale for this choice.[104] For other resources, including air quality, socioeconomics, transportation, and water, the FEIS fails to identify the area or extent of potential cumulative impacts. It is thus impossible to tell how the FEIS defines the area and extent of cumulative impacts for most resources.[105] While both the FEIS and the BLM's EA on the Lease Modifications contain a summary of cumulative effects across an area at the end of each document that identifies the area's size in acres, the location of these acres is not precisely defined.[106]

The FEIS's failure to provide a clear, consistent, and transparent cumulative impacts analysis violates NEPA and its "hard look" doctrine.

Second, without explanation, the cumulative effects analysis in the 2013 Lease Sale EA contradicts such analysis in the FEIS, demonstrating the FEIS's failure to properly address cumulative impacts. The FEIS and the Lease Modifications EA both acknowledge that the Lease Modifications, when analyzed in conjunction with North Fork oil and gas lease sale, may together have cumulative effects.[107] The 2013 Lease Sale EA similarly acknowledges that the oil and gas lease sale may have cumulative effects when analyzed in conjunction with the coal Lease Modifications.[108]

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[104] See FEIS (Exh. 2) at 119 ("The cumulative effects analysis area for vegetation is coincident with the Mount Gunnison Lynx Analysis Unit boundary") (emphasis added); id. at 127 (same statement re; biological assessment); id. at 132 (same for sensitive species).

[105] BLM EA for the Lease Modifications similarly fails to define the area and extent of potential cumulative effects for most resources. BLM EA (Exh. 3) at 20 ("For the purposes of this EA, potential cumulative impacts include those that could occur on other Federal and non-Federal lands" but not defining where those lands are).

[106] FEIS (Exh. 2) at 193 ("All cumulative effects are addressed specific to each resource area in Chapter 3. However, the following summary applies to the greater North Fork Valley. The geographic scope is focused on the North Fork Valley from east of the town of Delta, north to the Mesa/Delta County line, east to the Pitkin County boundary, then south and west along the watershed for the North Fork of the Gunnison River. This area is approximately 566,700 acres in total …."); BLM EA (Exh. 3) at 53 (containing same description of area). It is unclear why the FEIS and Lease Modifications EA analyze cumulative impacts to wildlife vegetation on two different scales (the Mount Gunnison LAU and the "North Fork Valley").

[107] FEIS (Exh. 2) at 50 (identifying the August 2012 lease sale, now the Feb. 2013 lease sale, as a project that may have cumulative effects with the coal Lease Modifications); BLM EA (Exh. 3) at 55-56 (same); FEIS (Exh. 2) at 195.

[108] 2013 Lease Sale EA (Exh. 24) at 26. The 2013 Lease Sale EA thus identifies a cumulative effects analysis area that apparently overlaps with, but may be smaller than, the cumulative effects analysis area

But the 2013 Lease Sale EA anticipates that development of oil and gas leases sold in the February 2013 auction could have impacts to numerous resources when analyzed cumulative with the coal Lease Modifications and other present and reasonably foreseeable actions, while the FEIS dismisses all potential cumulative impacts from the 2013 Lease Sale EA as "only speculation."[109] It is arbitrary and capricious for BLM to conclude in the 2013 Lease Sale EA that cumulative impacts from oil and gas leasing are "reasonably foreseeable" and therefore analyze and disclose them in that EA, while the FEIS dismisses such impacts as not reasonably foreseeable and turns a blind eye to such impacts.

For example, the 2013 Lease Sale EA addresses that the reasonable foreseeable impacts of oil and gas lease development on air quality, and concludes that the 2013 lease sale will, when analyzed cumulatively with other proposed actions, degrade the North Fork's air quality:

> At the time of approved lease development, when combined with the past, present and reasonably foreseeable actions (including increased traffic and the need for water disposal facilities) will elevate potential for the deterioration of air quality in the North Fork Valley. Increased development of fluid minerals will result in a cumulative increase in surface and subsurface disturbances as well as increase emissions during drilling and completion activities.… [T]he severity of the impacts will be elevated with increased contemporaneous development in the area.[110]

In contrast, the Lease Modifications FEIS predicts no cumulative impacts to air quality from the February 2013 lease sale.[111]

Similarly, the 2013 Lease Sale EA predicts and discloses the potential for cumulative effects on soils, while the FEIS is silent. The oil and gas leasing analysis states:

> This lease sale, when combined with the past, present and reasonably foreseeable actions, could elevate the potential for deterioration of soil health. Surface disturbance associated with oil and gas activities could magnify other impacts from activities on private and federal lands in the watershed. Other activities causing impacts to soils on BLM and Forest Service lands in the watershed include: coal mining, grazing, rights of ways, recreation and travel infrastructure. Impacts to soils also result from activities associated

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for the coal lease modifications. Compare id. at 23 (map) and id. at 22 (identifying cumulative effects analysis area for oil and gas leases as 380,640 acres) with BLM EA (Exh. 3) at 53 (identifying cumulative effects analysis area for coal Lease Modifications as 566,700 acres).

[109] FEIS (Exh. 2) at 50.

[110] 2013 Lease Sale EA (Exh. 24) at 33 (emphasis added).

[111] FEIS (Exh. 2) at 82-83 (no discussion of cumulative air impacts from oil and gas leases).

> with private property in the watershed, including: cultivation, irrigation, livestock production, residential and commercial land development, coal mining, and oil and gas development. The types of impacts expected from other actions in the watershed would be similar to those described for the proposed action. The cumulative effect of all the impacts in the watershed could contribute to decreased soil health.[112]

In contrast, the FEIS on the coal lease modifications identifies no other action of any kind besides coal mining that would have any effect on soils in its cumulative impacts analysis.[113]

In its analysis of the impacts of oil and gas production on vegetation, the 2013 Lease Sale EA predicts that oil and gas development, taken together with other foreseeable actions, may degrade ecosystem health.

> This lease sale, when combined with the past, present and reasonably foreseeable actions will elevate the potential for deterioration of vegetation health in the region through incremental reductions in quality and continuity of native plant communities. If these leases are developed, vegetation disturbance associated with oil and gas activities could magnify other impacts in the watershed that are taking place on private and federal lands. Additional impacts to vegetation on BLM and Forest Service lands in the watershed include those associated with wildfire, vegetation treatments, coal mining, livestock grazing, rights of ways, recreation and travel infrastructure. Impacts to vegetation which result from activities on private property in the watershed include: cultivation, irrigation, livestock production, residential and commercial land development, coal mining, and oil and gas development.[114]

Conversely, the FEIS does not address or acknowledge at all the potential cumulative impacts on vegetation of oil and gas develpment when taken together with coal mining.[115]

The 2013 Lease Sale EA concludes that oil and gas development, taken together with other foreseeable actions, may "contribute to decreased surface water quantity and quality":

> This lease sale, when combined with the past, present and reasonably foreseeable actions will elevate the potential for deterioration of surface water quality. Oil and gas activities could magnify other impacts in the watershed on private and federal lands due to the increased surface disturbance and use of hazardous chemicals and potential for leaks or spills in the watershed. Additional impacts on BLM and Forest Service lands in the watershed include; coal mining, grazing, rights of ways, recreation and travel infrastructure. Impacts associated with private property in the watershed include;

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[112] 2013 Lease Sale EA (Exh. 24) at 56 (emphasis added).

[113] FEIS (Exh. 2) at 104.

[114] 2013 Lease Sale EA (Exh. 24) at 62 (emphasis added).

[115] FEIS (Exh. 2) at 124-125.

> cultivation, irrigation, livestock production, residential and commercial land development, urban runoff, coal mining, and oil and gas development.
>
> The types of impacts expected from all of the cumulative actions in the watershed would be similar to those described for the proposed action. The cumulative effect of all the impacts in the watershed could contribute to decreased surface water quantity and quality.[116]

Despite this acknowledgement, the FEIS completely ignores the potential for cumulative impacts of oil and gas leasing on water quality when taken together with the coal lease modifications.[117]

In sum, while the Forest Service's FEIS dismisses the potential for cumulative impacts of the coal lease modifications, when taken together with the oil and gas leasing and production, as too "speculative" to disclose, the 2013 Lease Sale EA concludes that the two projects together may in fact degrade a number of resources. The FEIS's failure to fully address the cumulative impacts of oil and gas leasing together with the Lease Modifications violates NEPA.

D. The FEIS Fails To Take A "Hard Look" At The Likely Impacts Of Well Pads And Roads In Lease Modification COC-67232.

The FEIS declines to disclose the likely locations of roads and MDWs except in the most general terms because "a final mine plan has not been approved."[118] At the same time, the FEIS assumes that "if any exploration drilling, staging areas, and ground water monitoring drill pads and access road construction are needed, they would utilize the same locations as those used for MDWs."[119] Thus, the agencies assume that any exploration proposal is likely a good predictor of the future location of at least some of the MDW pads and roads.

The Forest Service already had before it, as it has for more than a decade, an exploration proposal submitted by MCC.[120] The FEIS admits that this proposal, though old, is still "pending."[121] This

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[116] 2013 Lease Sale EA (Exh. 24) at 105 (emphasis added).

[117] FEIS (Exh. 2) at 118 (containing no mention of oil and gas leasing).

[118] Id. at 55, 123.

[119] Id. at 54, 121.

[120] See Ark Land Co., Federal Coal Exploration License Application (Nov. 1998), attached as Exh. 25.

[121] FEIS (Exh. 2) at 533 (Ark Land Co.'s 1998 proposal has "remained as pending" since submitted).

proposal displays the location of roads and exploration wells. Further, in the fall of 2011 the Forest Service and Ark Land Company "laid out" and mapped a dozen exploration wells in the Lease Modifications area in preparation for cultural resource surveys (which are generally only undertaken in advance of ground disturbance), indicating MCC has already chosen the site of such wells, and potentially the roads to access them.[122]

The FEIS thus could have – and should have, pursuant to NEPA – used this information to inform its analysis of the likely extent of the construction of roads and MDW pads within the Lease Modifications area. Whether these maps represent a "final" exploration plan or not, they demonstrate the likely arrangement of roads and MDW pads in Lease Modification COC-67232, the eastern of the two lease modifications. The October 2011 exploration plan map displays about 1.5 miles "Road" connecting 6 exploration holes within Lease Modification COC-67232.[123] The 1998 exploration plan map also shows approximately 1.5 miles of road, on this map connecting 5 exploration wells.[124] Thus, two exploration

[122] See, e.g., email of D. Gray, GMUG NF (Mar. 7, 2012 12:29 PM) (discussing Ark Land Company and Forest Service site visit to Sunset Roadless Area "when we were laying out exp locations"), attached as Exh. 26; email of D. Gray, GMUG NF (Mar. 13, 2012 6:34:11 PM) (discussing Ark Land Company and Forest Service site visit to Sunset Roadless when the Forest Service was "working on the exp layout last fall"), attached as Exh. 27; email of D. Gray, GMUG NF (Feb. 2, 2012 4:34 PM) (discussing providing locations of twelve well locations "(SST1-SST12)", and stating that "I am assuming that they [the 12 wells] are the only ones proposed so far?" (emphasis added)), attached as Exh. 28; Map, Arch Coal Sunset Trail CR Survey and Report (Oct. 2011) (displaying wells SST1 through SST12 within the Lease Modifications area for the purposes of a cultural resources survey), attached as Exh. 29. Note that two of the well locations on the October 2011 map are directly within intermittent stream courses (SST2 and SST7), indicating the potential for damage to those sensitive areas. Moreover, MCC told the Forest Service by early April 2012 that the company wanted the Forest Service to complete "a more detailed analysis for surface disturbance [in the DEIS] … so that the document can also be used for the exploration and permitting process," indicating that the Mine was likely ready for the Forest Service to analyze proposed exploration well locations. See email of N. Mortenson (Apr. 5, 2012 8:33 AM), attached as Exh. 30. These emails and maps were obtained from GMUG NF project files pursuant to a Freedom of Information Act request.

[123] Compare Map, Arch Coal Sunset Trail CR Survey and Report (Oct. 2011) (Exh. 29) with FEIS (Exh. 2) at 162. The 2011 map shows two road segments – one running north-south in sections 11 and 14, and another running east-west in sections 14 and 15 – which total about 1.5 miles in length. The 2011 map also displays six "Exploration Hole[s] from Cad" (SST7-SST12).

[124] See map attached as last page to Ark Land Co. Exploration License Application (Exh. 25).

proposals more than ten years apart showed similar projects impacts to the lands within Lease Modification COC-67232.

The fact that the two exploration proposals depict similar impacts from road and MDW pad construction agreement should have informed the agencies, including BLM, of the potential impacts of development of this lease modification, even if, as the FEIS asserts, that the October 2011 exploration plan map, derived from "field work," was "more a wide-view, landscape-scale, field check, to determine the feasibility of locating future roads and well pads in the area."[125] But the FEIS apparently ignores these best predictors of likely development in the area. The October 2011 exploration plan map shows three time the road mileage and 150% of the MDW pads that the FEIS predicts for Lease Modification COC-67232 under the RFMP.[126] The 1998 exploration application map similarly shows far more road mileage and more MDW pads in Lease Modification COC-67322 than the FEIS assumes. The FEIS fails to explain why it ignored the best evidence at the Forest Service's disposal to significantly reduce the road miles and MDW pads – and thus the disturbance caused by those developments – for the lands within Lease Modification COC-67232. By ignoring this information, the FEIS fails to take the "hard look" NEPA requires.

Further, by underestimating and under-reporting the potential impacts to Lease Modification COC-67322, the FEIS skewed a key component of the alternatives analysis. The Forest Service and BLM rejected Alternative 4 – which would have permitted MCC to obtain 97% of the coal of the selected alternative – in part because road and MDW pad construction under the selected alternative would damage only "a small amount of [Forest] lands" of the Sunset Roadless Area's wilderness-capable lands in COC-67232. If the FEIS had properly disclosed the true impacts of the proposal to roadless lands in COC-67232, the balance of costs and benefits concerning Alternative 4 would have been different.

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[125] FEIS (Exh. 2) at 533.

[126] See id. at 102 (assuming 0.5 miles of road and 4 well pads within Lease Modification COC-67232, instead of the 1.5 miles of road and 6 well pads displayed on the October 2011 map of field work).

The FEIS's failure to disclose the foreseeable impacts of road and well-pad construction violate NEPA.

E. BLM's Approval Of The Lease Modifications Violates The Endangered Species Act.

1. Legal Background.

Section 7 of the Endangered Species Act ("ESA") requires that each federal agency (the "action agency") "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of the designated critical habitat of the listed species. 16 U.S.C. § 1536(a)(2). See also 50 C.F.R. Pt. 402 (implementing Section 7). To assist action agencies in complying with this provision, ESA Section 7 and its implementing regulations set out a detailed consultation process for determining the impacts of the proposed agency action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. Pt. 402. When an action agency learns that listed species may be present in the action area, that agency must prepare a biological assessment ("BA") on the effects of the action. 16 U.S.C. § 1536(c); 50 C.F.R. §§ 402.12, 402.14(a). "Once an agency has determined that its action 'may affect' a listed species or critical habitat, the agency must consult, either formally or informally, with the appropriate expert wildlife agency." Karuk Tribe of California v. U.S. Forest Serv., 681 F.3d 1006, 1027 (9th Cir. 2012). If after preparing a BA the agency determines that the proposed action "may affect" but is "not likely to adversely affect" any listed species or critical habitat, then the agency need not initiate formal consultation with the FWS. 50 C.F.R. § 402.14(b)(1). The process of determining whether formal consultation may be required is referred to as "informal consultation," which is described in implementing regulations as follows:

> Informal consultation is [a] … process that includes all discussions, correspondence, etc., between the [FWS] and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the [FWS], that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

50 C.F.R. § 402.13(a).

In sum, when setting the scope of the action on which consultation must occur, the ESA mandates that agencies analyze the "entire" agency action. Conner v. Burford, 848 F.2d 1441, 1452-53 (9th Cir. 1988) (citing 16 U.S.C. § 1536(b)(3)(A)); Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1155 (D. Ariz. 2002). This means that a biological opinion's (or BA's) analysis of effects to listed species and critical habitat "must be coextensive with the agency action." Conner, 848 F.2d at 1458; Greenpeace v. Nat'l Marine Fisheries Serv., 80 F. Supp. 2d 1137, 1143 (W.D. Wash. 2000) (agency "must prepare a … biological opinion equal in scope" to action consulted upon); Rumsfeld, 198 F. Supp. 2d at 1156 ("breadth and scope of the analysis must be adequate to consider all the impacts"). Accordingly, courts strike down biological opinions that fail to perform a comprehensive analysis of the entire action, including analyses that omit key areas or impacts. See, e.g., Conner, 848 F.2d at 1453-54 (analysis of entire agency action for oil and gas leasing must also include impacts from development).

The extent of direct and indirect effects defines the scope of consultation. The environmental baseline and effects analyses rely on the definition of the action area: "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02 (emphasis added); Native Ecosystems Council v. Dombeck, 304 F.3d 886, 902-03 (9th Cir. 2002) (overturning Forest Service's Section 7 analysis because it omitted key geographic area affected by proposal); Defenders of Wildlife v. Norton, 130 F. Supp. 2d 121, 128 (D.D.C. 2001) (deeming consultation "deficient because of the[] overly narrow definition of action area, which results in the exclusion of certain relevant impacts from the environmental baseline").

The ESA and its implementing regulations require every agency to ensure that "any action [the agency] authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species." 50 C.F.R. § 402.01. The regulations define "action" to include any "action[] directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (emphasis added). The effects of the agency action which must be evaluated include "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action." Id. "Indirect effects" include

effects "that are caused by the proposed action and are later in time, but still are reasonably certain to occur." Id. These direct and indirect effects must be considered together with a separate category of impacts known as "cumulative effects," which are "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." Id.

Courts have repeatedly found that impacts are "caused by" and "reasonably certain to occur" – and thus must be analyzed under the ESA as "indirect effects" in a BA or BO – when federal actions induce private or off-site development. For example, when considering the potential effects of the operation of a military base, a court required the U.S. Army to consider the indirect impacts caused by groundwater pumping required by its operation and people the base attracted to the area. Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139 (D. Ariz. 2002). Numerous other courts agree. See, e.g., Fla. Key Deer v. Paulison, 522 F.3d 1133, 1144 (11th Cir. 2008) (finding FEMA's flood insurance program may cause jeopardy to endangered Florida key deer by encouraging development); Nat'l Wildlife Fed'n v. Fed. Emergency Mgm't Agency, 345 F. Supp. 2d 1151, 1173-74, 1176 (W.D. Wash. 2004) (Section 7 consultation on FEMA flood insurance program must address harmful impacts of induced property development in flood zone because "development [was] reasonably certain to occur as a result of" the program, even though FEMA did not "authorize, permit, or carry out the actual development that causes the harm."); Riverside Irr. Dist. v. Andrews, 758 F.2d 508, 512 (10th Cir. 1985) ("To require [an agency] to ignore the indirect effects that result from its actions would be to require it to wear blinders that Congress has not chosen to impose" under the ESA); Nat'l Wildlife Fed'n v. Coleman, 529 F.2d 359, 373 (5th Cir. 1976) ("indirect effects" of highway construction include "the residential and commercial development that can be expected to result from the construction of the highway.").

2. Factual Background: BLM's And The Other Action Agencies' Decisions On The Coal Lease Modifications Will Cause Direct And Indirect Impacts To Adjacent Private and Public Lands.

The agency actions at issue in the Lease Modifications are the Forest Service's decision to consent to BLM to modify leases for, and the BLM's decision to modify leases for: (1) 800 acres of

Forest Service lands included in Federal Coal Lease Modification COC-1362; and (2) 921 acres of Forest Service lands included in Federal Coal Lease Modification COC-67232.[127] Of these 1,722 cumulative acres, approximately 1,700 acres are within the Sunset Colorado Roadless Area.[128] The purpose and effect of this decision is to provide MCC with access to approximately 10.1 million tons of federally-owned coal within the two lease modification areas.

The Forest Service's FEIS concludes that the Lease Modifications will result in impacts outside the Lease Modifications area as well. The FEIS states that "the leasing and development of the lease modifications also allow for the production of 5.6 million tons of fee coal on adjacent [private] lands ... as well as an additional 3.3 million tons from existing adjacent federal coal reserves."[129] The FEIS confirms that coal on private lands and adjacent public lands cannot be accessed unless MCC wins the right to mine the lease modifications area:

> Without the lease modifications, coal on existing federal leases and private lands would be bypassed because of current panel alignment on parent leases. [130]

The FEIS confirms that mining the coal reserves adjacent to the lease modifications, and its associated effects such as road and MDW construction, are indirect impacts of the lease modifications by basing its analysis of socioeconomic impacts on the mining of coal from both the lease modifications and also the private land and adjacent federal coal.[131]

Not only does BLM's and the other action agencies' decisions make this development likely, MCC may be required to mine the private lands given the geography of the Lease Modifications, the private land, and the orientation of the mining panels if the company is to access the coal in the Lease Modifications, since its coal panels start in the northwest and move toward the southeast.[132] The only

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[127] BLM ROD (Exh. 1) at 1.

[128] FS ROD (Exh. 6) at 3.

[129] FEIS (Exh. 2) at 54 (emphasis added).

[130] FEIS (Exh. 2) at 531 (emphasis added). See also supra at 11.

[131] See supra at 12 & n.35.

[132] See MCC, Map (Exh. 14).

way for MCC to access the coal in the southeast portion of the Lease Modifications area is to mine through the private land coal.

The FEIS, in a cursory fashion, acknowledges that coal mining on adjacent private and public land outside of the lease modifications area is likely to result in two types of impacts: (1) subsidence outside of the lease modifications area caused by underground mining there, and (2) habitat destruction caused by the construction of roads and MDW pads outside of the lease modifications area.

Concerning subsidence, the FEIS estimates the direct and indirect subsidence effects from mining under the lease modifications and adjacent private and Federal lands combined:

> If the tracts are leased, subsequent underground longwall mining would cause approximately 1500 acres of subsidence (~950 acres from mining COC-1362, ~150 acres from mining COC-67232, and ~400 acres from mining adjacent reserves in existing federal leases and adjacent private lands). [133]

The FEIS similarly considers these subsidence-related impacts a direct or indirect effect of the lease modifications.[134] Subsidence may result in landslides or slumping that could destroy lynx habitat. The FEIS, however, fails to locate on any map where these subsidence impacts may occur.

Aside from subsidence impacts, the FEIS also concludes that road and MDW pad construction within the lease modifications area will cause 72-75 acres of surface disturbance.[135] Further, the FEIS estimates that an additional 63 acres of ground disturbance is likely to accompany MDW pad and road construction on private and adjacent public lands outside of the Lease Modifications – 42 acres for MDW pads and 21 acres for roads to access them.[136] Here, too, the FEIS fails to display even generally where these impacts on adjacent private and public lands are likely to occur. [137] Since road and MDW pad construction require the elimination of all vegetation within the road-bed and drill pad, mining on private and adjacent public land outside the lease modification will destroy all habitat values on those 63 acres.

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[133] See FEIS (Exh. 2) at 90 (emphasis added). See also supra at 16.

[134] See supra at 12.

[135] FEIS (Exh. 2) at 53.

[136] See id. at 92.

[137] See also supra at 13-15.

While it is unclear whether all of the additional 63 acres of habitat to be eliminated for construction of MDW pads and roads on adjacent private and public lands outside of the Lease Modifications area will be lynx habitat, additional data in a table in the FEIS indicates without support that a portion those impacts will occur in lynx habitat. FEIS Table 3.10a appears to indicate that in addition to the estimated 75 acres of disturbance of suitable lynx habitat within the Lease Modifications area from MDW pad and road construction, it is "foreseeable" that an additional 17 acres of lynx habitat will be destroyed outside of the lease modifications area: 10 acres of suitable lynx habitat on private lands will be damaged, and similarly "foreseeable" that 7 acres of suitable lynx habitat on "Parent Lease COC-1362" will be impacted by surface impacts.[138]

The FEIS thus discloses that the Forest Service's decision to consent to the Lease Modifications and BLM's decision to issue the Lease Modifications are substantial factors in subsidence and habitat destruction impacts that will result from mining the coal on private and adjacent public lands. To the extent the lease modifications influence mining on adjacent private and federal lands, mining these adjacent coal reserves are indirect effects of the action for purposes of ESA consultation. Cf. Nat'l Wildlife Fed'n v. Coleman, 529 F.2d at 374.

3. BLM And The Other Action Agencies Failed To Designate A Lead Agency.

When a federal action involves multiple federal agencies, "the consultation and conference responsibilities may be fulfilled through a lead agency." 50 C.F.R. § 402.07. Utilizing this provision requires the lead agency to notify the Fish and Wildlife Service ("FWS"). "The Director shall be notified of the designation in writing by the lead agency." 50 C.F.R. § 402.07. See also Nat'l Wilderness Inst. v. U.S. Army Corps of Eng'rs, 2005 WL 691775, *13 (D.D.C. 2005) (relying on EPA's notification to NMFS that it would be the designated lead federal agency). Nothing in the Lease Modifications BA or FWS Concurrence indicates that the Forest Service, BLM, or OSM was designated the lead federal

[138] FEIS (Exh. 2) at 127-28. See also id. at 605 ("Upon further review, impacts to approximately 10,.3 [should be 10.3(?)] acres of private lands in presumably suitable lynx habitat may occur if private land actions related to the coal mining associated with the two lease modifications occur.").

agency. See also U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act 4-27 (1998) ("When one or more Federal actions are determined by the Services to be interdependent or interrelated to the proposed action, or are indirect effects of the proposed action, they are combined in the consultation and a lead agency is determined for the overall consultation.").

This apparent violation of the ESA's procedural requirements undermines compliance with the ESA's substantive requirement to avoid jeopardy, which is effected in part through the consultation process, designed explicitly "to ensure compliance with the [ESA's] substantive provisions." Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985). "If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." Id. (citing TVA v. Hill, 437 U.S. 153 (1978)).

4. Because The BA Analyzes Only Direct And Indirect Impacts Within The Lease Modifications Area, And Fails To Address Indirect Impacts On Adjacent Private And Federal Land, BLM And The Other Action Agencies Have Violated The ESA's Consultation Mandates.

In an attempt to address BLM and the other action agencies' consultation duties under ESA Section 7, the Forest Service issued a BA on the Lease Modifications in April 2010 – more than two years before the completion of the FEIS. That BA focuses on impacts to the Canada lynx, a species designated as threatened under the ESA in the southern Rockies, including Colorado.[139] The Lease Modification BA purported to examine the impacts of the Forest Service's consent to and the BLM's issuance of the lease modifications, the destruction of habitat likely to result from road and MDW pad construction caused by mining the lease, and of other past and reasonably foreseeable projects.[140]

The Forest Service identified a number of stipulations to the existing leases that "will be carried over" into the Lease Modifications "slightly modified to reflect changes in Management, specifically the

[139] GMUG NF, Biological Assessment for Federal Coal Lease Modifications (Apr. 16, 2010) at 10 ("Lease Modifications BA"), attached as Exh. 31. See also FEIS (Exh. 2) at 129.

[140] Lease Modifications BA (Exh. 31) at 10-15.

2008 Southern Rockies Lynx Management Direction."[141] The Forest Service concluded, among other things, that these stipulations "will mitigate impacts due to creation of roads and [MDW] pads within the area, winter access, and vegetative changes."[142] The Lease Modifications BA also concluded that disturbance to lynx denning and foraging "is not anticipated to be a substantial impact as … lease stipulations for this project follow guidelines as noted" in an appendix to the BA.[143] Based on its analysis, the Lease Modifications BA concluded that "[i]mplementation of the project 'may affect, but is unlikely to adversely affect' the Canada lynx."[144]

The FWS concurred with the Forest Service's "not likely to adversely affect" determination by a letter dated June 16, 2010.[145] The FWS stated that "[s]everal assumptions were incorporated into your analysis [that is, the Forest Service's BA] of effects as stated above. If these assumptions prove incorrect, please contact the [Fish and Wildlife] Service to discuss any changes that may require further analysis or reinitiation of section 7 consultation."[146]

The Lease Modifications BA assumptions are, in fact, incorrect, since the BA fails to account for the impacts to lynx habitat caused by coal mining under adjacent private and public lands made likely by the agency's decision. In light of the "expansive regulatory definition of action area," the appropriate scope of analysis encompasses all areas where lynx may be directly or indirectly affected by agency action. Defenders of Wildlife v. Norton, 130 F. Supp. 2d at 129-30. The BA assumes that road and MDW pad construction within the lease modifications area may disturb about 75 acres of lynx habitat.[147]

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[141] Id. at 6-7.

[142] Id. at 13.

[143] Id. at 15.

[144] Id. at 16.

[145] Letter from Allan R. Pfister, Western Colorado Supervisor, Fish and Wildlife Service, to Charles S. Richmond, Forest Supervisor, Grand Mesa, Uncompahgre and Gunnison National Forests (June 16, 2010) at 4 ("FWS Concurrence Letter"), attached as Exh. 32.

[146] Id.

[147] See Lease Modifications BA (Exh. 31) at 5 (describing project as impacting 48 acres from 48 MDW pads and 24 acres from 6.5 miles of road construction); FWS Concurrence Letter (Exh. 32) at 3 (assuming 45 acres of land cleared for MDW pads, and 24 acres cleared for temporary roads).

The BA identifies only the land inside the Lease Modifications as the land where impacts to lynx habitat may occur.[148] Thus, in assessing the impacts of "reasonably foreseeable" actions, the BA addresses only the 75 acres likely to be disturbed by mining of the Lease Modifications themselves.[149]

The BA is based on false assumptions and fails to account for the direct and indirect impacts of the action agencies' consent to and BLM's issuance of the lease modifications because it fails to account for or to mitigate the road or MDW pad construction associated with mining the adjacent private and public lands that the FEIS admits is a direct or indirect effect of the Lease Modifications. The BA fails to address the 63 acres of habitat that will be destroyed to make way for roads and MDW pads on private and adjacent public lands outside of the lease modifications, as identified in the FEIS.[150] Nor does the BA address the 10 acres of suitable lynx habitat on private lands that will be damaged, and the 7 acres of suitable lynx habitat on "Parent Lease COC-1362" that will be impacted by surface impacts as indicated in FEIS Table 3.10a.[151]

Further, the BA assumes that there is a chance that subsidence may alter 1360.5 acres of lynx habitat within the Lease Modifications area.[152] The FEIS reiterates this acreage figure, and reinforces that

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[148] Lease Modifications BA (Exh. 31) at 9 (Table 3).

[149] Id. at 10 (Table 4). While the BA mentions private land, nowhere does the BA account for or address the impacts to lynx habitat from private and public land mining that will be induced by the Lease Modifications decision as an indirect impact. The BA recognizes the likelihood of induced impacts. Id. at 4 ("The panels in the lease modifications would include the start lines and the first few thousand feet of five panels that would extend west off the FS lands and into coal reserves under private land."). But beyond that, the BA does not mention private land impacts except in the context of cumulative impacts, not induced, indirect impacts.

[150] FEIS (Exh. 2) at 92.

[151] Id. at 127-128.

[152] Lease Modifications BA (Exh. 31) at 12 ("in a subsidence worst-case-scenario situation, this lease modification and the underground mining associated with it would alter the entire surface topography of the modification area") (emphasis added); id. at 15 ("If all of the lease modification area subsides to the extent that surface habitat is damaged or destroyed, an additional 1360.5 acres of habitat would be lost within the LAU" (emphasis added)).

it does not address lands outside the Lease Modifications area.[153] This figure does not appear to account for the ~400 acres of subsidence that is likely to result from mining adjacent reserves in existing federal leases and adjacent private lands.[154] Nor does it match the 1500 acres of total subsidence predicted in the FEIS.[155]

In sum, BLM and the other action agencies are violating their substantive duties to protect the lynx from jeopardy by relying on a BA and informal consultation that fails to evaluate the entirety of the agencies' actions and all of their direct and indirect impacts. BLM and the other action agencies and FWS utilize an improper action area as it is restricted to the area of the lease modifications.[156] By unlawfully constricting the action area, the "may affect" and jeopardy analyses exclude adverse impacts to lynx that occur outside of the lease modifications area and that must be considered as part of the status of the species, the environmental baseline, and the effects of the action. Further, because BLM and the other action agencies have adopted decisions that "prove incorrect" the FWS's assumptions about the impacts of the BLM's and the other action agencies' decisions, the ESA requires BLM and the other action agencies to contact the FWS "to discuss any changes that may require further analysis or reinitiation of section 7 consultation." See FWS Concurrence Letter (Exh. 32) at 4; 16 U.S.C. § 1536(a)(2) (consultation mandate); 50 C.F.R. § 402.16(c) (requiring re-initiation of formal consultation if the proposed action is later modified in a manner that causes an effect that was not previously considered); 50 C.F.R. § 402.16(b) (requiring re-initiation of formal consultation if new information

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[153] See FEIS (Exh. 2) at 130 ("If all of the lease modification area subsides to the extent that surface habitat is damaged or destroyed, an additional 1360.5 acres of habitat would be lost within the LAU" (emphasis added)).

[154] Id. at 91.

[155] Id.

[156] That the BA and concurrence letter define the analysis area as the Mount Gunnison lynx analysis unit is irrelevant because neither actually analyzes impacts that occur outside of the lease modification units. For example, the BA's description of the environmental baseline borrows a table from the FEIS to illustrate the existing condition of the Mount Gunnison lynx analysis unit. This table is similar to Table 3.10a from the FEIS, except that it excludes the FEIS estimates of "foreseeable surface affected" on adjacent private lands and parent lease. Compare FEIS (Exh. 2) at 127-28 with Lease Modifications BA (Exh. 31) at 10 (displaying Table 4).

shows the action may impact listed species in a manner or to an extent not previously considered); Forest Guardians v. Johanns, 450 F.3d 455, 458 (9th Cir. 2006) (applying requirements concerning reinitiation of formal consultation to informal consultation). BLM and the other action agencies have apparently failed to do so.

BLM's and the other action agencies' failure to re-initiate consultation with the FWS on the additional habitat destruction outside of the Lease Modifications area, but indirectly caused by BLM's and the other action agencies' Lease Modifications decisions, violates the ESA.

5. BLM And The Other Action Agencies Have Violated Their ESA Section 7 Duty to Ensure Against Jeopardy.

Section 7 of the ESA states that

> each federal agency shall … insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'action agency') is not likely to jeopardize the continued existence of any endangered species or threatened species … .

16 U.S.C. § 1536(a)(2). BLM and the other action agencies may not rely on an unlawful Biological Assessment, nor may they rely on the FWS's concurrence with that BA, to fulfill this substantive duty. See Res. Ltd., Inc. v. Robertson, 35 F.3d 1300, 1304 (9th Cir. 1993) ("Consulting with the [FWS] alone does not satisfy an agency's duty under the Endangered Species Act."); Aluminum Co. of Am. v. BPA, 175 F.3d 1156, 1161 (9th Cir. 1999) ("an action agency may not escape its responsibility under the Endangered Species Act by simply rubber stamping the consulting agency's analysis"); Ctr. for Biological Diversity v. Rumsfeld, 198 F. Supp. 2d 1139, 1143 (D. Ariz. 2002) (finding that the action agency has "independent duty under § 7 of the ESA, 16 U.S.C. § 1536(a)(2), to not cause jeopardy or adverse modification to endangered species").

By consenting to or approving the Lease Modifications, BLM and the other action agencies are jeopardizing the lynx in violation of the ESA. Because the Lease Modifications BA and FWS concurrence are arbitrary and capricious and contrary to the ESA, BLM's and the action agencies' reliance on the BA and concurrence to determine that the Lease Modifications are not likely to adversely affect the lynx is arbitrary and capricious and violates the ESA. Given the invalid Lease Modifications

BA and concurrence, the ESA requires that BLM and the other action agencies avoid any irreversible or irretrievable commitments of resources or any action that may affect the lynx pending full compliance with Section 7. 16 U.S.C. § 1536(d).

Because BLM has violated the ESA, its actions approving the Lease Modifications must be set aside.

F. The FEIS's Failure To Address Direct Volatile Organic Compound (VOC) Emissions Associated With Methane Venting Violates NEPA.

The FEIS fails to analyze and assess the volatile organic compound ("VOC") emissions that will result from the reasonably foreseeable impacts of methane venting resulting from the Lease Modifications.[157] VOC emissions form ozone pollution (smog), making them pollutants of significant concern.[158] Under Clean Air Act regulations, VOCs, include "any compound of carbon," but exclude some specific carbon compounds, such as methane and ethane. However, while methane and ethane are expressly excluded as VOCs, other related compounds, including propane, pentane, butane, hexane and benzene are expressly regulated as VOCs. See 40 C.F.R. § 51.100(s).

BLM recognized that VOCs are released as a result of methane venting, and concluded that such pollution is a "Key Issue" to be addressed through NEPA.[159] However, the FEIS fails to analyze or assess these emissions or determine whether such emissions are significant under NEPA. Instead, the FEIS explicitly declines to analyze these emissions, stating, "no attempt is made here to quantify all non-methane emissions on an annual basis."[160] The FEIS's failure to address this "key issue" violates NEPA's "hard look" mandate.

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[157] Appellants WildEarth Guardians and Rocky Mountain Wild provided detailed comments regarding VOC emissions associated with methane venting. See FEIS (Exh. 2), Appendix H at 509-512. See also letter of J. Nichols, WildEarth Guardians to GMUG Nat'l Forest (July 9, 2012) at 2-7, attached as Exh. 33.

[158] See FEIS (Exh. 2) at 57.

[159] Id. at 75-76; id. at 10 (identifying VOC emissions as an "[i]ssue carried forward" in the FEIS); BLM ROD (Exh. 1) at 8 (identifying as one of the "BLM Key Issues" for the NEPA process "Effects of the Proposed Action may occur on air quality including … VOCs …."); BLM EA (Exh. 3) at 10 (same).

[160] FEIS (Exh. 2) at 76.

NEPA requires that issues identified as significant and carried forward for analysis will be adequately analyzed and assessed in an EIS. Agencies must disclose the "environmental impacts" of alternatives, including "direct effects and their significance." 40 C.F.R. § 1502.16(a). The only exception to the rule that environmental impacts be analyzed and assessed under NEPA is where information is "incomplete or unavailable." 40 C.F.R. § 1502.22. Even then, this exception is not absolute. Where information relevant to reasonably foreseeable significant adverse impacts is incomplete but "essential to a reasoned choice among alternatives," agencies must still obtain the information if the costs are "not exorbitant." 40 C.F.R. § 1502.22(a). Where information is unavailable or the costs of obtaining it are exorbitant, agencies must state that such information is incomplete or unavailable, state the relevance of the incomplete or unavailable information, summarize existing credible scientific evidence relevant to evaluating impacts, and evaluate such impacts based upon theoretical approaches or research methods. See 40 C.F.R. § 1502.22(b).[161]

Here, the FEIS and BLM identified VOC emissions as a significant issue to be carried forward for analysis,[162] but did not identify that information related to VOC emissions was "incomplete or unavailable." Thus, BLM had a duty to analyze and assess VOC emissions pursuant to NEPA. But the FEIS contains no such analysis.

None of the FEIS's excuses for declining to undertake this analysis are authorized or contemplated by NEPA.

For example, the FEIS alleges that existing data on VOC emissions is "limited."[163] However, the fact that such data may be "limited" underscores the need for the Forest Service to obtain additional data for purposes of ensuring an adequate analysis. Further, what "limited" VOC data is available shows that VOCs are likely being released at levels that would render the West Elk Mine in violation of the Clean Air Act. That data, taken from samples of two operating methane drainage wells in May 2009, show that

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[161] See also supra at 26.

[162] See supra at 50 n.159.

[163] FEIS (Exh. 2) at 76.

MDWs emit VOC pollutants including hexane and propane.[164] When one extrapolates the levels for hexane and propane from these two samples to an annual basis using reasonable assumptions, the levels of these pollutants reach levels that would appear to exceed Clean Air Act levels for reporting and/or reduction.[165] This underscores why VOC pollution is a "key issue," especially given rising ozone levels in western Colorado.[166]

Such impacts are directly relevant to BLM's duties pursuant to NEPA, particularly the agency's duty to demonstrate that its action will ensure compliance with applicable environmental laws and regulations. Indeed, BLM adopts the statement in the Forest Service's ROD that its decision is "consistent with [the Clean Air] Act."[167] Given that such data is limited, and that what data exists appears to show that the Mine's VOC emissions may violate the Clean Air Act, BLM's assertions to the contrary are unfounded.

The FEIS states that VOC emissions are likely "highly variable," because they are tied to methane emissions which are also variable.[168] Again, regardless of whether VOC emissions are "highly variable," it is unclear how this supports refusing to analyze or assess the potentially significant impacts of such emissions. Indeed, if emissions are "highly variable," then in all likelihood, they could be much higher than previously documented, underscoring the need for an analysis and assessment of such impacts. Further, while the FEIS claims methane emissions to which VOCs are tied are "highly variable," the FEIS includes an exact figure for the number of tons of methane released over a year (58,663 tons), demonstrating that no matter how "variable" emissions are, it is possible to measure and assess such emissions.[169]

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[164] Id. at 75.

[165] Letter of J. Nichols, WildEarth Guardians (Exh. 33) at 3-4.

[166] Id. at 5-6.

[167] FS ROD (Exh. 6) at 15; BLM ROD (Exh. 1) at 3-4 ("BLM concurs with the USFS' findings of consistency with laws, regulations and policy in the GMUG National Forest's FEIS and ROD").

[168] FEIS (Exh. 2) at 76.

[169] Id. at 75, 506.

The FEIS also implies that BLM need not analyze and assess VOC emissions from methane venting because the Colorado Air Pollution Control Division "will be requiring all coal mines in the state, including the West Elk Mine, to gather additional data to provide a more accurate annual estimate of VOC emissions."[170] However, simply because the Colorado Air Pollution Control Division (APCD) may at some point in the future be requiring the West Elk Mine to gather data related to VOC emissions does not allow the Forest Service to forego its duties under NEPA. If anything, the fact that the APCD may later require the West Elk Mine to gather such data underscores that the federal agencies could have done the same in the nearly four years between the time BLM received the Mine's application and when BLM issued its ROD. The fact that 2012 FEIS contained VOC emissions data from two samples taken in 2009 further demonstrates that BLM and the Forest Service sat on their hands for three years when they could have been gathering data to support required NEPA analysis. The fact that the APCD may require the West Elk Mine to gather data on VOC emissions further underscores that it is both possible to gather such data and not exorbitantly costly to do so.

In any case, the fact that another agency may be gathering data at some point in the future does not allow BLM to ignore its duties under NEPA, as federal courts have repeatedly found. In Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1123 (D.C. Cir. 1971), the D.C. Circuit held that relying on another agency's permitting duty to decline to disclose information pursuant to NEPA "neglects [NEPA's] mandated balancing analysis. Concerned members of the public are thereby precluded from raising a wide range of environmental issues in order to affect particular [agency] decisions. And the special purpose of NEPA is subverted." Id. Similarly, in South Fork Band Council v. Dep't of the Interior, 588 F.3d 718 (9th Cir. 2009), the Ninth Circuit rejected BLM's argument that NEPA did not require the agency to consider air impacts from certain mining operations because the facility was regulated under a state air permit. The court stated: "This argument also is without merit. A

[170] Id. at 76.

non-NEPA document – let alone one prepared and adopted by a state government – cannot satisfy a federal agency's obligations under NEPA." S. Fork Band Council, 588 F.3d at 726.

The FEIS's failure to analyze VOC emissions renders the analysis and assessment of air quality impacts arbitrary and capricious. For example, the FEIS dismisses analyzing and assessing the impacts of coal mining to ambient concentrations of ground-level ozone because it asserts that the West Elk mine "emits and will continue to emit ... ozone precursors at relatively low levels."[171] The FEIS further explains that "the levels of emissions discussed in previous sections do not warrant ... photochemical modeling analysis to assess impacts from ozone."[172] However, without an actual analysis and assessment of VOC emissions from methane venting, the FEIS has no basis to assert that ozone precursor emissions, including VOC emissions, are "low" or otherwise "do not warrant" modeling to assess ozone impacts.

Further, an analysis and assessment of VOC emissions is directly relevant to whether the Forest Service's decision "threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment," a factor that agencies must address when assessing the significance of impacts under NEPA. See 40 C.F.R. § 1508.27(b)(10). If VOC emissions levels are sufficient to trigger major source thresholds under the Clean Air Act's prevention of significant deterioration ("PSD") program (see 42 U.S.C. § 7475), then the West Elk Mine is currently operating in violation of the Clean Air Act.[173] Given that NEPA explicitly requires federal agencies to consider whether their actions threaten a violation of federal law imposed for the protection of the environment, the Forest Service must analyze and assess VOC emissions in order to provide a rational basis for its assertion that operations at the West Elk Mine will be in compliance with the Clean Air Act.[174]

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[171] Id.

[172] Id.

[173] See letter of J. Nichols (Exh. 33) at 4.

[174] The Forest Service must also analyze and disclose this information because the Clean Air Act explicitly requires the agency to ensure that agency actions "comply with" all Federal, State, and other requirements respecting the control and abatement of air pollution. See 42 U.S.C. § 7418(a). This requirement is echoed by the area's resource management, which requires BLM to meet Clean Air Act standards. See BLM, Uncompahgre Basin Resource Management Plan and Record of Decision (July

The FEIS fails to analyze or assess VOC emissions related to methane venting. However, simply because BLM declined to comply with NEPA does not allow it to forego its legal obligations. In this case, an adequate analysis and assessment of VOC emissions was necessary to support the BLM's contention that the West Elk Mine is operating and will operate in compliance with the Clean Air Act, and that VOC emissions, as well as the potential impacts of mining operations to ambient concentrations of ozone, are not significant. BLM does not demonstrate that information related to VOC emissions was "incomplete" or "unavailable" such that it would be allowed under NEPA to avoid analyzing and assessing such impacts. The ROD must therefore be set and BLM directed to analyze and assess VOC emissions related to methane venting at the West Elk Mine.

G. The FEIS Fails To Take The Required 'Hard Look' At The Lease Modifications' Contribution To Ozone Pollution.

The FEIS fails to analyze or assess the impacts of the Lease Modifications to National Ambient Air Quality Standards ("NAAQS") for ground-level ozone. The FEIS's excuses for not conducting such an analysis and assessment do not permit BLM to escape its duty under NEPA to take a "hard look" at the Lease Modifications' ozone impacts. The agency's failure to take the required hard look follows in part from its failure to analyze and assess VOC emissions associated with the West Elk Mine discussed above.

The FEIS asserts that ozone precursor emissions must be "substantial in quantity" before an analysis and assessment of ozone impacts becomes useful.[175] Accordingly, the FEIS claims that VOC emissions from the Mine would be "at relatively low levels," or at levels that "do not warrant" ozone analysis.[176] Although it may be true that ozone precursor emissions should be "substantial in quantity" in order to prompt an analysis and assessment of ozone impacts, the FEIS provides no information or

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1989) at 31 ("Present air quality standards will be adhered to throughout the entire planning area. This is required by law."), available online at http://www.blm.gov/pgdata/etc/medialib/blm/co/field_offices/uncompahgre_field/documents.Par.74380.File.dat/UB%20RMP_ROD.pdf (last visited Jan. 28, 2013).

[175] FEIS (Exh. 2) at 76.

[176] Id.

analysis to demonstrate that the Mine's VOC emissions would not be "substantial." The FEIS thus has no reasoned basis for declining to analyze or assess ozone impacts.

The FEIS appears to justify its failure to address ozone impacts due to the "complexities" of ozone formation.[177] However, the FEIS provides no information or analysis to demonstrate that information related to impacts to the ozone NAAQS is "incomplete," "unavailable," or that the costs of obtaining such information would be exorbitant. NEPA does not allow federal agencies to forego an analysis and assessment of environmental impacts because they are "complex," but rather only allows an agency to forego such an analysis and assessment in accordance with the standards at 40 C.F.R. § 1502.22.

The FEIS also asserts that "modeling of the mine's emissions [is] highly unlikely to yield any significant impacts to atmospheric concentrations."[178] This assertion is an unfounded presupposition. To the extent the Forest Service may claim that this statement represents "professional judgment," even professional judgment must be based on a rational and reasonable foundation of information and analysis. See, e.g., Pub. Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1505 (D.C.Cir.1986) ("While we acknowledge our deference to the agency's expertise in most cases, we cannot defer when the agency simply has not exercised its expertise.").

In this case, the FEIS's presupposition appears based on the claim that Mine's emissions will continue as they always have, and therefore current monitoring is "considered representative of expected future ambient concentrations" of ozone.[179] This "things will stay the same forever" approach is wholly unsubstantiated, especially given the agency's refusal to analyze and assess VOC emissions related to methane venting. Further, it does not appear to reflect the reality of the past. As the FEIS discloses, ozone concentrations in western Colorado have been increasing since 2009.[180] For example, ozone

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[177] Id.

[178] Id.

[179] FEIS (Exh. 2) at 76.

[180] Id. at 60.

concentrations in nearby Garfield County have increased form 0.062 parts per million to 0.066 parts per million and concentrations in Mesa County have increased from 0.064 parts per million to 0.068 parts per million. If trends continue, both Garfield and Mesa Counties will violate the ozone NAAQS in the future.

Although the FEIS may assert that nearby Colorado counties do not yet violate the ozone NAAQS, and therefore the Mine's emissions will not cause or contribute to violations of the NAAQS, this argument lacks merit.[181] NEPA requires agencies to disclose and analyze reasonably foreseeable impacts of an agency action. To this end, although an area may be in compliance with the ozone NAAQS today, it may not be in compliance tomorrow. NEPA contemplates that agencies analyze and assess future environmental impacts. The FEIS's failure to analyze and assess ozone impacts on the basis of past and present impacts violates NEPA.

H. BLM Cannot Implement The Lease Modifications Because The Modifications Rely On The Colorado Roadless Rule, Which Was Adopted In Violation Of Law.

The FEIS and ROD assume that the Lease Modifications can be implemented once the Colorado Roadless Rule is finalized.[182] However, while the Colorado Rule is final, it was adopted in violation of law. BLM's ability approve and implement the Lease Modifications is thus subject to an injunction based on the agency's reliance on an illegally promulgated rule.[183]

The FEIS fails to take a "hard look" at all of the reasonably foreseeable environmental impacts of the Colorado Roadless Rule. NEPA requires that federal agencies take a "hard look at [the] environmental consequences" of their proposed actions. Robertson v. Methow Valley Citizens Council,

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[181] Based on the FEIS's argument, there should be no areas of the United States that are currently in violation of the ozone NAAQS as every part of the United States has, at some point in the past, been in compliance with the ozone NAAQS. According to the EPA, however, there are many areas of the U.S., including in Colorado and Wyoming, that are currently in violation of the NAAQS. See EPA, List of 8-hour Ozone Nonattainment Areas, http://www.epa.gov/airquality/greenbook/hnc.html (last viewed Jan. 28, 2013).

[182] See FS ROD (Exh. 6) at 3; BLM ROD (Exh. 1) at 2 (access roads authorized under Colorado Roadless Rule needed for foreseeable mine plan).

[183] The Lease Modification FEIS admits that "[i]f the Colorado Roadless Rule is enjoined by a court of law, then the responsible official would not be able to select Alternative 3," the alternative chosen in the ROD. FEIS (Exh. 2) at 585.

490 U.S. 332, 350 (1989) (internal quotation omitted). "The purpose of the 'hard look' requirement is to ensure that the 'agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" Colo. Envtl. Coal. v. Salazar, 875 F.Supp.2d 1233, 1250 (D. Colo. 2012) (quoting Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97 (1983)).

The Colorado Rule FEIS fails to address direct, indirect, and cumulative effects of the proposed action, by disclosing reasonably foreseeable greenhouse gas ("GHG") emissions of the proposed action and evaluating the impacts of those emissions on climate change. See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 538 F.3d 1172, 1194 (9th Cir. 2008) (establishing that an agency has taken a hard look at environmental effects of its action when it has provided "a reasonably thorough discussion of the significant aspects of the probable environmental consequences") (internal quotations omitted); Mayo Found. v. Surface Transp. Bd., 472 F.3d 545, 556 (8th Cir. 2006) (upholding EIS that adequately considered "reasonably foreseeable significant adverse effects" on the environment). The Colorado Rule FEIS acknowledges the types and sources of GHG emissions caused by each of the alternatives. They include carbon dioxide, nitrogen oxides, and methane.[184] The Colorado Rule FEIS does not analyze emissions data from existing activities, see WildEarth Guardians v. U.S. Forest Serv., 828 F.Supp.2d 1223, 1231 (D. Colo. 2011), and does not argue that the scale of the proposed action is so small that an effects analysis would meaningless, see Hapner v. Tidwell, 621 F.3d 1239, 1245 (9th Cir. 2010). Instead, Colorado Rule FEIS asserts that the "nature of the proposed Colorado Roadless Rule is programmatic and the extent of greenhouse gas emission is not quantifiable at this stage."[185]

The Colorado Rule FEIS fails to articulate a legally sufficient explanation supporting its assertions that GHG emissions caused by the action are impossible or too speculative to quantify. Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, 1035 (10th Cir. 2002)

[184] U.S. Forest Service, Final EIS, Rulemaking for Colorado Roadless Areas, Colorado Rule FEIS (May 2012) at 128-130 ("Colorado Rule FEIS"), excerpts attached as Exh. 34.

[185] Id. at 130.

(agency's reasoned basis for decision must be clearly disclosed in and supported by the record). The Colorado Rule FEIS contains no rational basis for characterizing future activities as completely uncertain and therefore useless to any attempt to estimate reasonably foreseeable GHG emissions from authorized activities such as road construction and vehicular use, tree cutting and removal, and construction, drilling, production, processing, and transportation associated with energy development.[186]

Contrary to being uncertain, the Forest Service had the means and the data to project reasonably foreseeable future activities – and thus GHG emissions – under the proposed action. "Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as a 'crystal ball inquiry.'" Scientists' Inst. for Pub. Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C. Cir. 1973). In fact, the Forest Service was able to project and quantify a variety of activities that may occur under the alternatives:

- acres of tree cutting and removal for hazardous fuel treatments, for ecosystem restoration, and for habitat improvements;[187]
- miles of road construction for oil and gas, coal mining, and other purposes;[188]
- miles of LCZs for water conveyances, utilities, and oil and gas pipelines;[189]
- six or seven coal exploration licenses and about four leasing actions;[190]
- number of methane well pads and acres of surface disturbance for coal mining;[191]
- access to millions of tons of recoverable coal reserves;[192] and
- number of wells and well pads, and pad acres for oil and gas operations.[193]

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[186] Id. at 128-30.

[187] Id. at 57.

[188] Id. at 59.

[189] Id. at 61.

[190] Id. at 71.

[191] Id. at 72.

[192] Id. at 74-77.

In short, while the Colorado Rule FEIS is able to estimate the amount of coal to be mined, the number of miles of road associated with coal mining, the acres of well pads cleared to facilitate coal mining, and the number of jobs related to coal mining under various alternatives, the Forest Service claims it is somehow unable to estimate the GHG emissions associated with the coal mining that the Rule was adopted to promote. The Colorado Rule FEIS's reasoning that any future "potentially air-pollution-emitting action" was "speculative at best … not just in terms of timing, location, scale, and many other factors, but also speculative as to whether the action would even occur,"[194], is arbitrary and capricious because the agency quantified and monetized similar and related impacts including mine energy development, mine production, and energy revenues. See Ctr. for Biological Diversity, 538 F.3d at 1203 (finding arbitrary and capricious an agency decision to monetize uncertain benefits of CAFE rule, such as car crashes, congestion costs, and value of energy security, but not monetize the benefit of emissions reductions). The Colorado Rule FEIS concluded energy development was one of only two issues that it could analyze "quantitatively" in the economic consequences section of the EIS.[195] The Forest Service projected energy production based on 2009 information,[196] modeled North Fork Valley labor income based on production and employment at the mines "plus all other secondary effects,"[197] and estimated the value of production, employment, and labor income for oil and gas drilling, oil and gas production, and coal production over a 15-year period.[198] The Forest Service was also able to model "direct, indirect, and

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[193] Id. at 87.

[194] Id. at H-54.

[195] Id. at 304; see also id. at H-61 ("Based on quantifiable estimates of management and production for each alternative, economic impacts to Colorado counties are provided ….").

[196] Id. at 305.

[197] Id. at 310.

[198] Id. at 315-18.

induced effects"[199] for production value, employment, and labor income,[200] as well as annual state and local government revenues from energy development such as coal mining.[201]

The Colorado Rule FEIS's assertion that GHG emissions from authorized energy development are too speculative, in contrast to the document's disclosure of economic impacts, does not reflect the "hard look" NEPA requires.

Nor is the nature of the impact of GHG from coal combustion speculative. The Colorado Roadless Rule is designed to facilitate the exploration and development of certain coal resources.[202] Where the extent of the impact is speculative, the court explained that the agency should have availed itself of CEQ regulations "specifically designed" for evaluating environmental effects when there is incomplete or unavailable information. Mid States Coal. for Progress, 345 F.3d at 549-50 (citing 40 C.F.R. § 1502.22). This the Forest Service also failed to do, in violation of NEPA.

Because the Colorado Roadless Rule was adopted in violation of NEPA, BLM cannot implement the Lease Modifications which rely on that rule.

V. APPELLANTS FACE IRREPARABLE HARM IF A STAY IS NOT GRANTED.

Appellants demonstrate at least two types of irreparable harm if a stay is not granted. First, damage to the environment is likely to occur in the coming months if a stay is not granted. Second, if BLM, other federal agencies and the West Elk Mine begin work on the Mine's development plans for the Lease Modifications area in the absence of the required environmental review, NEPA's purpose of requiring agencies to "look before they leap" will be undermined.

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[199] See id. at H-62 (defining direct, indirect, and induced effects as "Economic impacts of employment, income, and production were estimated for the energy industry itself (direct), all local supporting businesses (indirect), and businesses affected by employee spending (induced).").

[200] Id. at 315, 316.

[201] Id. at 315, 320.

[202] Id. at 6 (stating the need for the Colorado Roadless Areas Rule to "accommodate state-specific situations and concerns" including "facilitating exploration and development of coal resource in the North Fork coal mining area"); 77 Fed. Reg. at 39,577 (same); see also Colorado Rule FEIS (Exh. 34) at H-38 ("Coal mining is an important part of the State's economy and was considered in development of the final rule."). Compare Mid States Coal. for Progress, 345 F.3d at 549 (nature of impact not speculative where stated project purpose was to increase the availability and decrease the price of coal).

A. Appellants Will Suffer Imminent And Irreparable Environmental Harm If A Stay Is Not Granted.

The "irreparable harm requirement" for a stay "is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." Greater Yellowstone Coal. v. Flowers, 321 F.3d 1250, 1258 (10th Cir. 2003) (quoting Adams v. Freedom Forge Corp., 204 F.3d 475, 484–85 (3d Cir. 2000)) (emphasis omitted). Environmental harms, by their nature, cannot be compensated by monetary damages, and as such, are typically irreparable. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987).

Appellants face a significant risk of environmental harm if a stay is not granted.

The purpose of these Lease Modifications is not to provide MCC with a paper right that the company will never use, but to cause coal mining to occur. By approving the Lease Modifications, BLM seeks "to ensure that … coal reserves are recovered," and "to facilitate recovery of federal coal resources."[203]

Mining the Lease Modifications' coal reserves will cause significant and immediate environmental harm. According to the FEIS, it is "reasonably foreseeable" that the Lease Modifications will result in: subsidence on more than a thousand acres, the clearing of drilling of 48 methane drainage pads, the erection of 48 MDWs, and bulldozing of 6.5 miles of new road.[204] This construction will occur within a pristine area the Forest Service identified as "roadless" in 2005; some of these lands have been identified by the Forest Service as having wilderness character.[205] Seventy-five acres of vegetation will be removed, including forests that provide habitat for elk, black bear, numerous bird species, and the imperiled lynx, listed as a threatened species under the ESA.[206] Scenic vistas will be marred by bulldozer-carved gashes in the forest. Millions of cubic feet a day of federally-owned methane will be vented and wasted, worsening climate change. Air pollution will be emitted from MDWs and mine

[203] BLM ROD (Exh. 1) at 6; FEIS (Exh. 2) at 4.

[204] FEIS (Exh. 2) at 54.

[205] See E. Zukoski letter to Forest Service (Exh. 4) at 40-43.

[206] FEIS (Exh. 2) at 126-54.

facilities. Opportunities to protect land as wilderness will be lost. The FEIS states that some of these losses represent an "irreversible and irretrievable commitment of resources."[207] Those who now enjoy recreate in the area to enjoy its remote, natural values and quiet will find instead an industrial landscape threaded with roads and overrun with heavy equipment, scraped wellpads, noisy vents, and waste pits.[208] These real environmental harms will harm Appellants and their members, and will continue to cause damage for years.[209]

Federal courts have repeatedly found that the drilling of wells – the same type of surface disturbance anticipated here – causes irreparable harm when the activities would destroy vegetation, impact a natural area, cause noise, and degrade recreational and aesthetic enjoyment of such areas. See, e.g., San Luis Valley Ecosystem Council v. U.S. Fish & Wildlife Serv., 657 F. Supp. 2d 1233, 1237, 1240 (D. Colo. 2009) (drilling two exploratory oil wells inside wildlife refuge constitutes irreparable harm); Anglers of the Au Sable v. U.S. Forest Serv., 402 F. Supp. 2d 826, 837-38 (E.D. Mich. 2005) (finding irreparable harm from limited exploratory oil and gas drilling). Courts have also held that mine construction can cause irreparable harm. See Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 472 F.3d 1097, 1100 (9th Cir. 2006) (finding irreparable harm where inundating lands for a proposed mine "will adversely affect the environment by destroying trees and other vegetation").

Further, courts in NEPA cases have held that harm to aesthetic and recreational interests – which Appellants allege here – is irreparable, and these courts have consequently enjoined actions that would result in such harm. See, e.g., Fund for Animals, Inc. v. Espy, 814 F. Supp. 142, 151 (D.D.C. 1993) (finding potential injury to plaintiffs' aesthetic interest in wildlife, and stating "[n]or can money damages compensate plaintiffs' procedural injury caused by defendant's NEPA violation").

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[207] Id. at 192.

[208] See E. Zukoski letter to Forest Service (Exh. 4), passim; Reed Decl. (Exh. 8) at ¶¶ 8-13; Nichols Decl. at ¶¶ 13-21 (Exh. 9).

[209] Reed Decl. (Exh. 8) at ¶¶ 8-13; Nichols Decl. (Exh. 9) at ¶¶ 13-21 and Exh. 1 attached thereto.

There is every indication that harms from road and MDW pad construction will occur shortly, within a matter of months. MCC apparently intends promptly to move to explore and then mine coal within the lease modifications.[210] BLM has stated that mining would likely begin as early as this year. According to the FEIS, "BLM estimates that the E Seam coal in the lease modifications would be mined interspersed with coal from existing leases from about 2013 to 2016," although "some variations to these timeframes may occur."[211] Thus, bulldozing of forests for roads and well-pads is imminent, according to BLM's projections. Further, there is every indication that MCC wishes to mine the Lease Modifications area as soon as possible. MCC told federal agencies in 2011 that its "drop dead" date for obtaining approval of the Lease Modifications was March 31, 2012, ten months ago.[212] MCC enlisted the help of Congressman Scott Tipton, who apparently elicited a promise from the Director of BLM that BLM would undertake an "expedited NEPA process" to ensure that BLM issued its Record of Decision approving the Lease Modifications by March 2012 so that the mine could "continue production."[213] MCC was thus demanding an "expedited" decision that would permit the company to mine the Lease Modifications as quickly as possible.

While MCC must obtain additional federal and state approvals before it can construct roads and MDW pads in the Lease Modifications area, that fact does not make the harms less imminent. With the signing of the ROD here, BLM has completed all but one of the steps and conditions for assigning the Lease Modifications area's coal rights to MCC. That final step is obtaining the coal company's written

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[210] See A. Johnson, Crested Butte News (Exh. 22) (MCC officials indicate in April 2012 that exploration drills could be drilled in 2013.

[211] FEIS (Exh. 2) at 190.

[212] Email of K. Welt, Mountain Coal Co. to N. Mortenson, U.S. Forest Service (Oct. 24, 2011 3:53 PM) ("MCC's drop dead date for *issuance* of the lease modifications is March 31, 2012"), attached as Exh. 35; email of N. Mortenson, U.S. Forest Service to of K. Welt, Mountain Coal Co., et al. (July 19, 2011 4:36 PM) ("I am assuming per yesterday's conversation that MCC's drop dead date to make their business decision [on the Lease Modifications] is March 31, 2012"), attached as Exh. 36.

[213] Letter of Rep. Scott Tipton to BLM Director R. Abbey (Aug. 5, 2011) ("To reiterate our discussion …. The expedited NEPA process should allow for a Record of Decision to grant the lease modifications by March 1, 2012 …. I am optimistic that the expedited NEPA process and the stated completion date you provided will allow the Company to continue production and avoid layoffs at the mine."), attached as Exh. 37.

acceptance of conditions imposed in the modified lease and a written consent to a modified bond. 43 C.F.R. § 3424.3. Signing the lease requires no federal action, and will take no time at all. Once signed, MCC will have vested rights to mine the area, including the right to construct surface facilities necessary to remove coal. The question will then be not whether MCC can mine the coal, but how. As this Board has held, "once a [coal] lease is issued, BLM is precluded from abrogating the lessee's rights under the lease." Order, WildEarth Guardians & Sierra Club, IBLA 2011-191, 2012 WL 721790 (Feb. 6, 2012) at *6 (emphasis added). Further, in signing the Lease Modifications, MCC will be under an affirmative obligation to diligently develop the lease. See 43 C.F.R. § 3475.5. And, as noted above, BLM predicted, and MCC has indicated, that such mining will occur quickly. Further approvals from the state mining agency and the Office of Surface Mining are likely to require months, but not years. Thus, harm could occur before this Board has time to rule on the appeal's merits.

The fact that this is a lease modification, and not a new lease, means mining is more imminent. In WildEarth Guardians & Sierra Club, this Board evaluated a challenge to a BLM decision to offer a lease by application, and found harm from mining not to be imminent. The Board noted the subsequent steps required to occur before the coal company even obtained the right to mine, stating that the BLM "has yet to offer the [area] for competitive leasing" and that the lease applicant "is not guaranteed acquisition of a lease at the competitive sale." WildEarth Guardians & Sierra Club, 2012 WL 721790 at *5. MCC need not go through any such steps here before moving forward with a mine plan modification proposal; it simply needs to sign the lease. Unlike in WildEarth Guardians & Sierra Club, mining here is likely to occur in the "reasonably foreseeable future," id. at 6, given BLM's predictions, MCC's desires, and the FEIS's conclusion that road and MDW construction were in fact "reasonably foreseeable."

B. Appellants Will Suffer Irreparable Harm From Uninformed Agency Decisionmaking.

If the Lease Modification is signed, Appellants will also suffer irreparable injury from the exact harm NEPA is intended to prevent: uninformed agency decisionmaking. NEPA aims to protect the environment by requiring an agency to "carefully consider[] detailed information concerning significant

environmental impacts." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). Courts recognize that "when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered." Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989); see also Jones v. D.C. Redevelopment Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974) ("[T]he harm with which the courts must be concerned in NEPA cases is not, strictly speaking, harm to the environment, but rather the failure of the decision-makers to take environmental factors into account the way that NEPA mandates.").

Courts, including the U.S. Supreme Court, long ago concluded that failure to disclose environmental impacts of coal mining on federal lands should result in an injunction because of the potential harm to citizens' rights to know and to participate in agency decisionmaking under NEPA:

> It is axiomatic that if the Government, without preparing an adequate impact statement, were to make an "irreversible commitment of resources," a citizen's right to have environmental factors taken into account by the decisionmaker would be irreparably impaired. For this reason, the lower courts repeatedly enjoined the Government from making such resource commitments without first preparing adequate impact statements. Indeed this past Term, . . . we indicated that it would have been appropriate for the Court of Appeals to have enjoined the approval of mining plans had that court concluded that "the impact statement covering (the mining plans) inadequately analyzed the environmental impacts of, and the alternatives to, their approval."

New York v. Kleppe, 429 U.S. 1307, 1312 (1976) (quoting Natural Res. Def. Council v. NRC, 539 F.2d 824, 844 (2d Cir. 1976) & Kleppe v. Sierra Club, 427 U.S. 390, 407–08 (1976)) (footnote omitted and emphasis added).

Lower courts faced with similar circumstances have reached the same conclusion. In enjoining a drilling project, one court explained the irreparable nature of such an injury: "[T]he Plaintiffs' procedural interest in a proper NEPA analysis is likely to be irreparably harmed if [the company] were permitted to go forward with the very actions that threaten the harm NEPA is intended to prevent, including uninformed decisionmaking." San Luis Valley Ecosystem Council, 657 F. Supp. 2d at 1241. See also Davis v. Mineta, 302 F.3d at 1114 ("Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment."); Brady Campaign to Prevent Gun Violence v. Salazar, 612 F.Supp.2d 1, 24 (D.D.C. 2009) ("a procedural violation of NEPA is ... a relevant

consideration" for determining irreparable injury.); Colo. Envt'l Coal. v. Office of Legacy Mgmt., 819 F. Supp. 2d 1193, 1205-06 (D. Colo. 2011) (finding issuance of 31 leases for uranium mining, in light of the procedural NEPA violations, had tangible effects so as to show irreparable injury).

The legal principle that stays in NEPA cases are appropriate to avoid uninformed decisionmaking comports with precedent requiring stays of those activities that will foreclose or impair remedies for alleged wrongs. See, e.g., Sierra Club v. Norton, 207 F. Supp. 2d 1310, 1340–41 (S.D. Ala. 2002) (finding irreparable harm because allowing development to go forward "would potentially preclude or limit the court's ability to craft a meaningful remedy. Failure to enjoin the construction would seriously diminish plaintiff's opportunity to obtain relief in this case."). This Board has recognized that a stay may be necessary to ensure that appellants obtain effective relief. W. Wesley Wallace, 156 IBLA 277, 278 (2002). If a stay is not granted and if Appellants later succeed in this appeal, alternatives may have been foreclosed and environmental harms realized prior to an ultimate decision on the merits. Therefore this Board must issue a stay to ensure that no surface-disturbing activities can occur until this case is decided and any new NEPA analysis completed.

C. A Lease Represents Irreparable Harm Because Its Issuance Starts A Bureaucratic Steamroller.

Allowing work to begin on a project when NEPA claims are at issue threatens to unleash the "bureaucratic steamroller" that will make it impossible for the agency to look before it leaps. See, e.g., Davis v. Mineta, 302 F.3d 1104, 1115 (10th Cir. 2002); Colo. Wild, Inc. v. U.S. Forest Serv., 523 F. Supp. 2d 1213, 1221 (D. Colo. 2007) (allowing project to go forward "represents a link in the chain of bureaucratic commitment that will become progressively harder to undo the longer it continues" (quoting Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989). While MCC may require additional approvals before exploiting the Lease Modifications, the bureaucratic steamroller unleashed by BLM's ROD is thus gaining momentum that makes approval of mining, and road and MDW pad construction ever more likely.

Absent a stay, Appellants will suffer irreparable harm even if this Court later suspends the Lease Modifications as part of its decision on appeal. In Commonwealth of Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983), Justice – then Judge – Stephen Breyer ruled that the issuance of mineral leases can irreparably harm plaintiffs because of the bureaucratic momentum they create toward implementing the original decision.

In Massachusetts, plaintiffs sought a preliminary injunction against an offshore oil and gas lease sale. The Interior Department argued that "the lease sale alone cannot hurt the environment" because subsequent approvals were required before drilling could begin. 716 F.2d at 952. The court rejected the Department's argument and affirmed the district court's injunction. The court held that even if a supplemental EIS was required,

> … the successful oil companies would have committed time and effort to planning the development of the blocks they had leased, and the Department of the Interior and the relevant state agencies would have begun to make plans based upon the leased tracts. Each of these events represents a link in a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues … and it is the presence of this type of harm that courts have said can merit an injunction in an appropriate case.

716 F.2d at 952.[214]

The same concerns exist here. MCC has stated that it is likely to pursue exploration of the lease tract shortly, and it will promptly begin seeking approval to implement its mine plan soon after it signs Lease Modification. Allowing MCC to take action based on approval of the Lease Modifications means the bureaucratic steamroller will begin rolling, and will be difficult to stop.

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[214] Massachusetts was not overruled by Amoco Production Company v. Village of Gambell, 480 U.S. 531, 545 (1987). In fact, Judge Breyer squarely rejected this claim in Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989) ("The difficulty of stopping a bureaucratic steam roller, once started, still seems to us, after reading Village of Gambell, a perfectly proper factor for a district court to take into account in assessing that risk, on a motion for preliminary injunction."). In Village of Gambell, the Supreme Court held that a court cannot presume irreparable harm based on a procedural violation, but must apply the traditional equity standards. As Judge Breyer pointed out in Sierra Club v. Marsh, the court did no such thing in Mass. v. Watt. Id. Rather, the court applied the traditional balancing test and found that the risk of "real environmental harm [from] inadequate foresight and deliberation" outweighed the other harms in that case. Id.

1. A Bureaucratic Steamroller Removes Equality Between Parties And Creates An Uneven Playing Field Swayed By Bureaucratic Momentum And Political Pressure.

Allowing BLM to finalize the Lease Modifications without a valid environmental analysis will create an uneven playing field for Appellants, an uphill battle that will continue to steepen with each additional step. Without a stay, there is significant risk that Appellants will have to work against political and private pressures placed on BLM, creating a "skewed" second look if Appellants are successful on appeal. See, e.g., Davis, 302 F.3d at 1115 & n. 7 (Where an agency proceeds with implementation of part of a project "before the environmental analysis is complete, a serious risk arises that the analyses of alternatives required by NEPA will be skewed toward completion of the entire Project."); Colorado Wild v. U.S. Forest Serv., 523 F. Supp. 2d at 1213 (holding irreparable injury includes "risk that in the event the Forest Service's [decisions] are overturned and the agency is required to 'redecide' the access issue, the bureaucratic momentum created by Defendants' activities will skew the analysis and decision-making of the Forest Service towards its original, non-NEPA compliant access decision."). This uneven playing field exists even where an agency proceeds with activities (such as planning) that do not involve on-the-ground disturbance.

Issuance of these Lease Modifications will also create a substantial risk that any new NEPA analysis and decision by BLM on remand could be influenced by leaseholders threatening takings and breach of contract claims should the agency not reaffirm its decision to lease the entire area. See Conner v. Burford, 848 F.2d 1441, 1461 (9th Cir. 1988) (suggesting that lessees "may have claims for damages against the government" if plaintiffs prevail and government subsequently changes its decision after further NEPA analysis).

2. Lease Issuance Represents An Irretrievable Commitment Of Agency And Private Resources.

By issuing the Lease Modifications, BLM will commit itself – before it has complied with NEPA – to allowing coal mining, along with road construction, blading of MDW pads, and harmful air pollution releases, in the area.

> It is true that in a typical mineral leasing case, environmental plaintiffs do not have to wait until drilling permits have been issued before they may bring suit…. In part this is so because the issuance of the lease represents the irreversible commitment of public resources for private use …. Once the lease is issued, the lessee "cannot be prohibited from surface use of the leased parcel."

SUWA v. Juan Palma, BLM, --- F.3d ---, 2013 WL 71780, at *19 (Jan. 8, 2013). See also Connor, 848 F.2d at 1451 (as a "non-NSO oil or gas lease constitutes the 'point of commitment;' after the lease is sold the government no longer has the ability to prohibit potentially significant inroads on the environment."). Agencies must therefore comply with NEPA "before an irretrievable commitment of resources is made." New Mexico v. BLM, 565 F.3d 683, 718 (10th Cir. 2009).

The approved Lease Modifications do not forbid surface disturbance; in fact the permitting agencies have concluded that the Lease Modifications cannot be exploited without road and MDW construction.[215] Without an NSO stipulation attached to the lease, it is unclear what authority BLM retains "to preclude surface disturbing activities even if the environmental impact of such activity is significant." See, e.g., Sierra Club v. Peterson, 717 F.2d at 1414; see also id. at 1414-15 ("Notwithstanding the assurance that a later site-specific analysis will be made, in issuing these [oil and gas] leases the Department has made an irrevocable commitment to allow *some* surface disturbing activities."). Because the challenged Lease Modifications do not include NSO stipulations, BLM has opened the door for development that will harm Appellants regardless of subsequent permitting processes at the mine development stage. Such an irreversible commitment by BLM, made without fully considering the environmental consequences and before this Board can consider this case, irreparably harms Appellants.

D. Appellants Will Suffer Irreparable Harm From Being Denied Meaningful Relief In The Event Of Success On Appeal

Appellants seek a stay to ensure that if they "prevail[] on the merits, [their] victory would have meaning." Biodiversity Conservation Alliance v. Stem, 519 F.3d 1226, 1232 (10th Cir. 2008). A substantial risk exists that as a practical matter, the Lease Modifications will limit the remedies

[215] FS ROD (Exh. 6) at 17 ("development of the lease modifications without roads … is not feasible at this time. Therefore, motorized access via roads is necessary.")

Appellants can obtain from the Board if they prevail on appeal. A number of courts have viewed mineral leases as constraining the availability of final relief. For example, in The Wilderness Society v. Wisely, a district court ruled that oil and gas leases were issued in violation of NEPA, but declined to void the lease issuance – "and all of the BLM's subsequent acts implementing that decision – as doing so might adversely affect property interests obtained by lessees as a result of the lease sale." 524 F. Supp. 2d 1285, 1306 n. 12 (D. Colo. 2007).

Other courts have shown similar reluctance to void mineral leases, even after plaintiffs have prevailed on the merits of their claims. See Conner, 848 F.2d at 1461 (declining to void leases despite NEPA violations, due to concern about the "minimum imposition on the rights of lessees"); Montana Wilderness Ass'n v. Fry, 408 F. Supp. 2d 1032, 1038 (D.Mont. 2006) (declining to void leases despite NEPA violations). Enjoining issuance of the Lease Modifications will allow the Board to award effective relief, and ensure that BLM can truly reconsider its leasing decision if Appellants prevail.

If BLM issues the Lease Modifications and MCC begins moving forward with its mine plan for the area without the benefit of an adequate prior NEPA review while this case is before the Board, it will defeat much of the purpose of the NEPA analysis on remand. See San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service, 657 F.Supp.2d 1233, 1241-42 (D.Colo. 2009) (finding NEPA remedy, "which would be either to require the USFWS conduct an EIS or to cure the deficiencies in the EA, would be meaningless if drilling were to proceed during the pendency of this litigation"); see also Found. on Econ. Trends v. Heckler, 756 F.2d 143, 157 (D.C. Cir. 1985) ("If plaintiffs succeed on the merits, then the lack of an adequate environmental consideration looms as a serious, immediate, and irreparable injury.").

VI. THE IRREPARABLE HARM TO APPELLANTS OUTWEIGHS ANY HARM TO BLM OR ANY OTHER PARTY.

In cases involving the preservation of the environment, the balance of harms usually favors granting a stay:

> Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Amoco Prod., 480 U.S. at 545. The balance of harms here weighs heavily in favor of granting a stay.

As shown above, the Appellants face substantial and irreparable harm if the Lease Modifications are approved, since those Lease Modifications grant MCC rights to mine coal, build roads, and scrape well pads, and since such damage is likely to occur before this Board rules on the merits.

On the other hand, BLM faces little harm from a brief stay. The agency has no legal or cognizable interest in allowing immediate development of the coal leased. Given that it took BLM three years and 11 months to reach a decision on MCC's applications, the agency itself can hardly complain that it is suddenly in a hurry. Further, BLM's interest in promoting mineral production from the public lands and generating royalties is contingent on first performing adequate analysis and land use planning to assure that the development is environmentally sound – as required under NEPA, FLPMA, and the ESA. See, e.g., 43 U.S.C. 1701(a)(8) (one purpose of FLPMA is to manage public lands in a manner that protects the environment). BLM's multiple-use mandate and resource conservation interests will be better served by a stay and a decision requiring further NEPA analysis in compliance with BLM's legal duties. See San Luis Valley Ecosystem Council, 657 F. Supp. 2d at 1240-42 (the minimal harm to federal government and lessee from delaying exploratory drilling was outweighed by irreparable harm to plaintiffs).

In contrast to the harms Appellants, their members, and the environment would suffer, any harm asserted by the BLM or MCC would be "economic, and therefore not irreparable." See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 235 F. Supp. 2d 1143, 1162 (W.D. Wash. 2002); see also Acierno v. New Castle Cnty., 40 F.3d 645, 653 (3d Cir. 1994) ("Economic loss does not constitute irreparable harm ...."); Wis. Gas Co. v. Fed. Energy Regulatory Comm'n, 758 F.2d 669, 674 (D.C. Cir. 1985) (same).

Further, it is unlikely that MCC would suffer any immediate economic harm even if it must bypass coal reserve in the Lease Modifications, since the West Elk Mine can continue operations with its

current reserves for another 12-14 years.[216] Thus, even if coal is bypassed, MCC will face no financial harms or potential job losses until 2025 at the earliest. MCC has over a decade to find other coal reserves for mining.

VII. THE PUBLIC INTEREST FAVORS GRANTING A STAY.

The public interest tips heavily in favor of a stay. Protecting public lands and ensuring compliance with the law – in particular compliance with laws that protect the environment and public participation – are all in the public interest.

First, the public has a strong interest in protecting public lands, which the Lease Modifications will damage. Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1177 (9th Cir. 2006); Wyo. Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1250 (10th Cir. 1973), overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

Second, the public has an interest in ensuring that federal agencies comply with laws designed to protect public lands and the environment. Davis, 302 F.3d at 1116; Colo. Wild, 523 F. Supp. 2d at 1223. A stay in this case would serve the public interest by protecting the Sunset Roadless Area pending the outcome of this appeal.

Specifically, courts have noted that the public interest supports an injunction halting agency action pending full compliance with NEPA: "[T]his invokes a public interest of the highest order: the interest in having government officials act in accordance with law." Pub. Serv. Co. of Colo. v. Andrus, 825 F. Supp. 1483, 1509 (D. Idaho 1993) (quoting Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991)). See also National Ski Areas Ass'n, Inc. v. U.S. Forest Serv., -- F. Supp. 2d --, 2012 WL 6618263 at *15 (D. Colo. Dec. 12, 2012) ("there is public interest in ensuring that federal agencies adhere to" federal laws, including the Forest Service organic act). The public interest strongly favors a stay because when it enacted NEPA, Congress mandated that environmental impacts and

[216] FEIS (Exh. 2) at 48 ("Mine life is currently projected to be 11-12 additional years of federal coal reserves with perhaps as much as 2 additional years on fee reserves.").

alternatives be considered before the agency takes action. Thus, compliance with NEPA after an agency authorizes an action is severely disfavored and not in the public interest.[217]

On the other side of the scale, a stay will not harm the public. At most, such an injunction may put off coal mining at one location for a relatively short time period while this Board completes its deliberation on the merits. And while development of the nation's mineral resources may be in the public interest, that interest must be weighed against the public interest in clean air and honest decisionmaking. Courts have recognized that our need for energy does not trump environmental considerations. In a case involving natural gas (methane) development in neighboring Wyoming, a court held:

> The Court is cognizant of the importance of mineral development to the economy of the State of Wyoming. Nevertheless, mineral resources should be developed responsibly, keeping in mind those other values that are so important to the people of Wyoming, such as preservation of Wyoming's unique natural heritage and lifestyle. The purpose of NEPA ... is to require agencies ... to take notice of these values as an integral part of the decisionmaking process.

Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp. 2d 1232, 1260 (D. Wyo. 2005).

For all of these reasons, the public interest favors granting a stay in this case.

[217] The law, and federal courts, require that agencies complete NEPA documentation before deciding to take a federal action. 40 C.F.R. § 1500.1 ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." (emphasis added)); see also Methow Valley Citizens Council, 490 U.S. at 349 ("Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." (emphasis added)); Friends of the River v. Fed. Energy Regulatory Comm'n, 720 F.2d 93, 106 (D.C. Cir. 1983) ("And of particular importance, the EIS requirement inhibits post hoc rationalizations of environmental decisionmaking."); Sierra Club v. Lujan, 716 F. Supp. 1289, 1293 (D. Ariz. 1989) ("While the agency has broad discretion in determining when to do an EA/EIS and while NEPA only prescribes the necessary process and does not mandate particular results, post hoc compliance with NEPA is unlawful.").

CONCLUSION AND PRAYER FOR RELIEF

For the above-stated reasons, Appellants High Country Citizens' Alliance, WildEarth Guardians, Sierra Club, and Rocky Mountain Wild respectfully request that the Board of Land Appeals grant the following relief:

(1) Stay BLM's decision to approve Lease Modifications COC-1361 and COC-67232 pending a decision by the Interior Board of Land Appeals on the merits of this appeal;

(2) Set aside and reverse the Colorado State Director's December 27, 2012 Record of Decision approving the Lease Modifications until such time as BLM complies fully with the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., the Endangered Species Act, 16 U.S.C. § 1531 et seq., and implementing regulations, the Administrative Procedure Act, 5 U.S.C. § 706, and any other applicable laws, and remand the matter to the agency for further action consistent with the law;

(3) Award Appellants their costs of litigation, including reasonable attorneys fees, under the Equal Access to Justice Act, 28 U.S.C. § 2412, et seq., and 43 C.F.R. § 4.601, et seq; and

(4) Provide Appellants any other relief the Board deems just and proper.

Respectfully submitted January 28, 2013.

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CERTIFICATE OF SERVICE

I certify that on January 28, 2013, I caused this Notice of Appeal and Petition for Stay, together with four volumes of exhibits, [218] to be served by certified U.S. mail, return receipt requested, upon:

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[218] Note that Ms. Hankins, Ms. Sharrow, Ms. Guerriero, and Mr. Drysdale all consented to receive exhibits solely in electronic format (on CD).

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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

	)	IBLA Appeal No. _____
	)	
HIGH COUNTRY CITIZENS' ALLIANCE,	)	
WILDEARTH GUARDIANS,	)	**APPEAL OF THE RECORD OF DECISION**
SIERRA CLUB, and	)	**FOR FEDERAL COAL LEASE**
ROCKY MOUNTAIN WILD,	)	**MODIFICATIONS COC-1362 & COC-67232,**
	)	**DOI-BLM-CO-SO50-2012-0013,**
Appellants.	)	**GUNNISON COUNTY, COLORADO**
	)	
	)	
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TABLE OF EXHIBITS

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Exhibit 19	P. Epstein et al., Full cost accounting for the life cycle of coal, Ann. N.Y. Acad. Sci. (2011)
Exhibit 20	L. Johnson & C. Hope, The social cost of carbon in U.S. regulatory impact analyses: an introduction and critique, J. Envtl. Stud. & Sci. (Sept. 9, 2012)
Exhibit 21	Interagency Working Group on Social Cost of Carbon, Technical Support Document (Feb. 2010)
Exhibit 22	A. Johnson, Mining officials hope for longer lease on life for West Elk Mine, Crested Butte News (Apr. 25, 2012)
Exhibit 23	Bureau of Land Management, Decision (Sep. 14, 2012)
Exhibit 24	BLM, February 2013 Oil and Gas Lease Sale for the Uncompahgre Basin Resource Area (DOI-BLM-CO-S050-2012-0009-EA) (Nov. 16, 2012) (excerpts)
Exhibit 25	Ark Land Co., Federal Coal Exploration License Application (Nov. 1998)
Exhibit 26	Email of D. Gray, GMUG NF (Mar. 7, 2012 12:29 PM)
Exhibit 27	Email of D. Gray, GMUG NF (Mar. 13, 2012 6:34:11 PM)
Exhibit 28	Email of D. Gray, GMUG NF (Feb. 2, 2012 4:34 PM)
Exhibit 29	Map, Arch Coal Sunset Trail CR Survey and Report (Oct. 2011)
Exhibit 30	Email of N. Mortenson (Apr. 5, 2012 8:33 AM),
Exhibit 31	GMUG NF, Biological Assessment for Federal Coal Lease Modifications (Apr. 16, 2010)
Exhibit 32	Letter from Allan R. Pfister, Western Colorado Supervisor, Fish and Wildlife Service, to Charles S. Richmond, Forest Supervisor, Grand Mesa, Uncompahgre and Gunnison National Forests (June 16, 2010)
Exhibit 33	Letter of J. Nichols WildEarth Guardians to GMUG Nat'l Forest (July 9, 2012)
Exhibit 34	U.S. Forest Service, Final EIS, Rulemaking for Colorado Roadless Areas, Colorado Rule FEIS (May 2012) (excerpts)
Exhibit 35	Email of K. Welt, Mountain Coal Co. to N. Mortenson, U.S. Forest Service (Oct. 24, 2011 3:53 PM)
Exhibit 36	Email of N. Mortenson, U.S. Forest Service to of K. Welt, Mountain Coal Co., et al. (July 19, 2011 4:36 PM)
Exhibit 37	Letter of Rep. Scott Tipton to BLM Director R. Abbey (Aug. 5, 2011)